

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
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Vol. 24

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90-64)

CANCELLATION WITH PREJUDICE OF INDIVIDUAL CUSTOMS BROKER'S LICENSE NO. 5201 ISSUED TO VINCENT J. MALLON

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Commissioner of Customs on July 18, 1990, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and section 111.51(b) of the Customs Regulations, as amended (19 CFR 111.51(b)), cancelled with prejudice the individual Customs broker's license No. 5201 issued to Vincent J. Mallon.

Dated: July 30, 1990.

WILLIAM LUEBKERT,
Acting Director,
Office of Trade Operations.

[Published in the Federal Register, August 7, 1990 (55 FR 32168)]

(T.D. 90-65)

REVOCATION OF CUSTOMS BROKER'S PERMIT NO. 14032 ISSUED TO MILTON SNEDEKER CORPORATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Customs broker permit number 14032, issued to the Milton Snedeker Corporation, to conduct Customs business in the Norfolk, Virginia District, has been revoked by operation of law pursuant to section 641(c)(3), Tariff Act of 1930, as amended (19 U.S.C. 1641(c)(3)), for failure to employ, for a continuous period of 180 days at least one validly licensed individ-

ual to exercise responsible supervision and control over its Customs business in that district. Such revocation was effective the close of business on June 27, 1990.

Dated: August 1, 1990.

WILLIAM LUEBKERT,
Acting Director,
Office of Trade Operations.

[Published in the Federal Register, August 9, 1990 (55 FR 32557)]

(T.D. 90-66)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JULY 1990

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Wednesday, July 4, 1990.

Greece drachma:

July 2, 1990	.....	\$0.006161
July 3, 1990	.....	.006180
July 5, 1990	.....	.006192
July 6, 1990	.....	.006165
July 9, 1990	.....	.006192
July 10, 1990	.....	.006203
July 11, 1990	.....	.006173
July 12, 1990	.....	.006150
July 13, 1990	.....	.006211
July 16, 1990	.....	.006184
July 17, 1990	.....	.006190
July 18, 1990	.....	.006211
July 19, 1990	.....	.006209
July 20, 1990	.....	.006231
July 23, 1990	.....	.006274
July 24, 1990	.....	.006297
July 25, 1990	.....	.006297
July 26, 1990	.....	.006279
July 27, 1990	.....	.006311
July 30, 1990	.....	.006329
July 31, 1990	.....	.006337

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list
for July 1990 (continued):

South Korea won:

July 2, 1990	.....	\$0.001391
July 3, 1990	.....	.001392
July 5, 1990	.....	.001391
July 6, 1990	.....	.001391
July 9, 1990	.....	.001390
July 10, 1990	.....	.001388
July 11, 1990	.....	.001389
July 12, 1990	.....	.001389
July 13, 1990	.....	.001391
July 16, 1990	.....	.001391
July 17, 1990	.....	N/A
July 18, 1990	.....	.001391
July 19, 1990	.....	.001392
July 20, 1990	.....	.001392
July 23, 1990	.....	.001392
July 24, 1990	.....	.001392
July 25, 1990	.....	.001392
July 26, 1990	.....	.001392
July 27, 1990	.....	.001392
July 30, 1990	.....	.001393
July 31, 1990	.....	.001393

Taiwan N.T. dollar:

July 2, 1990	.....	N/A
July 3, 1990	.....	\$.036805
July 5, 1990	.....	.036836
July 6, 1990	.....	.036848
July 9, 1990	.....	.036856
July 10, 1990	.....	.036843
July 11, 1990	.....	.036856
July 12, 1990	.....	.036863
July 13, 1990	.....	.036860
July 16, 1990	.....	.036883
July 17, 1990	.....	.036882
July 18, 1990	.....	.036866
July 19, 1990	.....	.036795
July 20, 1990	.....	.036670
July 23, 1990	.....	N/A
July 24, 1990	.....	.036738
July 25, 1990	.....	.036738
July 26, 1990	.....	.036765
July 27, 1990	.....	.036810
July 30, 1990	.....	.036792
July 31, 1990	.....	.036782

(LIQ-03-01 S:NISD CIE)

Dated: August 6, 1990.

CATHERINE A. CHUIPEK,
Acting Chief,
Customs Information Exchange.

(T.D. 90-67)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR JULY 1990

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 90-53 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Wednesday, July 4, 1990.

Thailand baht (tical):

July 9, 1990	N/A
July 16, 1990	N/A

United Kingdom pound:

July 31, 1990	\$1.860000
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(LIQ-03-01 S:NISD CIE)

Dated: August 6, 1990.

CATHERINE A. CHUIPEK,
Acting Chief,
Customs Information Exchange.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 7, 1990.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the Customs Bulletin," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 90-93)

Abstracts of Unpublished Customs Service Decisions

COMMODITY CLASSIFICATION

C.S.D. 90-93(1)—*Commodity:* Athletic supporter. The article is a textile athletic supporter packaged with a protective cup, and an athletic supporter packaged separately. The cup is plastic with a rubber-like cushioned edge. *Classification:* The athletic supporter and athletic supporter with protective cup are classified under subheading 6212.90.0030, HTSUSA, textile category 659, as brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted, other, of man-made fibers or man-made fibers and rubber or plastics. *Document:* HQ 086505, dated April 12, 1990.

C.S.D. 90-93(2)—*Commodity:* Car shelters. The merchandise is a tent-like structure, constructed of electrostatically galvanized steel tubing, a woven polyolefin material covering, and lacing of unspecified materials for holding the covering to the tubes. The polyolefin coverings are coated with plastics. *Classification:* Samples 1 or 2 of the shelters are classified under subheading

6306.22.9000, HTSUSA, textile category 669, as tarpaulins, awnings and sunblinds, tents, sails for boats, sailboards or landcraft, camping goods, tents, of synthetic fibers, other. Samples 3 or 4 of the shelters are classified under subheading 3926.90.9050, HTSUSA, as other articles of plastics and articles of other materials of headings 3901 to 3914, other * * * NYRL 842147 of June 15, 1989, is modified. *Document:* HQ 086548, dated April 12, 1990.

C.S.D. 90-93(3)—*Commodity:* Children's dress-up articles. Various items of apparel imported in bulk. The items include scarves, skirts, veils, capes, plastic flower pins, plastic beads, and hats. The items will be combined and packaged (one of each) in the U.S. as a set of dress-up articles sold as a mix and match costume collection. *Classification:* The knit nylon tricot scarf is classifiable under subheading 6002.20.6000, HTSUSA, as other knitted or crocheted fabric, other, of a width not exceeding 30 centimeters, of man-made fibers. The woven polyester skirt is classifiable under subheading 6204.53.3020, HTSUSA, as women's or girls' skirts and divided skirts, of synthetic fibers, other, other, girls'. The reversible nylon tulle skirt, the woven lame scarf, the polyester veil with headband, the lace cape and woven polyester cape are classifiable under subheading 6214.30.0000, HTSUSA, as shawls, scarves, mufflers, mantillas, veils and the like, of synthetic fibers. *Document:* HQ 086672, dated June 22, 1990.

C.S.D. 90-93(4)—*Commodity:* Fiber optic cable. The applicability of subheading 9802.00.80, HTSUSA, to fiber optic cable from Canada. U.S.-origin acrylate coated optical fiber and coated corrugated steel tape is exported to Canada for assembly operations with certain Canadian-origin components and a few materials sourced from third countries. *Classification:* The U.S. components do not lose their physical identity in the assembly operation, and are not advanced in value or improved in condition except by assembly operations and operations incidental thereto. Allowances in duty may be made under subheading 9802.00.80, HTSUSA. The cable is classifiable in subheading 8544.70.00, HTSUSA. *Document:* HQ 555544, dated May 1, 1990.

C.S.D. 90-93(5)—*Commodity:* Fibrillation. The definition of the term "fibrillated" when used in connection with imported cordage products. "Fibrillation" defines the process of splitting uniaxially oriented films into separate fibrils. Heading 5607, HTSUSA. *Document:* HQ 083629, dated March 26, 1990.

C.S.D. 90-93(6)—*Commodity:* Towels. Four samples of bleached, 100 percent cotton, herringbone twill weave towels used for washing and wiping dishes in restaurants and other commercial institutions. *Classification:* The towels are classifiable in subheading 6302.91.0045, HTSUSA, under the provision for kitchen linen, other, of cotton, other, towels, other, dish. *Document:* HQ 086811, dated July 12, 1990.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 10, 18, 125, 171, and 172

RIN: 1515-AA91

DELEGATION OF AUTHORITY TO DECIDE PENALTIES AND LIQUIDATED DAMAGES CASES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations by increasing the authority of Customs field officers to act on certain supplemental petitions for relief in administrative cases involving penalties and forfeitures, or claims for liquidated damages, incurred for violations of the customs or navigation laws and regulations. The document also proposes the delegation of additional authority to Customs field officers regarding petitions and supplemental petitions on penalties and forfeitures incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592). It is expected that this proposed delegation of increased authority to district directors will result in more expeditious processing of less complex cases, thereby benefiting the importing and traveling public. The authority to act beyond the increased limits of authority delegated to field officers would be retained by the Commissioner of Customs, insofar as it has been delegated by the Secretary of the Treasury.

DATE: Comments must be received on or before October 9, 1990.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Sandra L. Gethers, Penalties Branch, (202 566-8317).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), the Secretary of the Treasury is empowered to mitigate or remit fines, penalties, or forfeitures that are incurred under the customs or navigation laws. Section 623(c), Tariff Act of 1930 (19 U.S.C. 1623(c)), authorizes the Secretary to cancel any charge made against a bond for breach of any condition of the bond, upon payment of a lesser amount of penalty or upon such other terms and conditions as the Secretary may deem advisable. With certain stated exceptions, by paragraph 1(h) of Treasury Department Order No. 165, Revised (T.D. 53654), the Secretary delegated authority to the Commissioner of Customs to act on all cases where the claim for liquidated damages, fine or penalty (including the forfeiture) is not in excess of \$100,000. This order granted full mitigation authority to the Commissioner for specifically listed violations, including all liquidated damages claims.

Customs continually monitors its efforts to efficiently and expeditiously process penalties, seizures and liquidated damages cases. Delegation of certain responsibilities to the field and lessening the case load at Customs Headquarters has proven successful in the past as a means of decreasing Customs case handling time.

By Treasury Decision 85-25 (50 FR 7336) published on February 22, 1985, Customs amended §§ 171.21 and 172.21 to increase the authority of district directors to act on petitions for relief in administrative cases involving penalties, forfeitures or claims for liquidated damages. With the exception of penalties arising under section 1592, district directors were delegated initial authority not only to mitigate or remit fines, penalties, and forfeitures, but also authority to cancel any claims for liquidated damages arising from breaches of the terms or conditions of any bond, under sections 171.21 and 172.21, Customs Regulations (19 CFR 171.21, 172.21), respectively, when the total amount does not exceed \$100,000.

When Treasury Decision 85-25 was issued, certain other provisions of the regulations dealing with specific liquidated damages claims were not similarly amended to increase the authority delegated to district directors. Accordingly, it is now proposed to amend certain sections of Part 10, Part 18, and Part 125, Customs Regulations (19 CFR Parts 10, 18, and 125) which provide a limit of \$50,000 or less for liquidated damages. The proposed amendments to the regulations would replace those limits with \$100,000 as the appropriate limit for cases to be decided by Customs field offices.

1592 CASES

Regarding the remission of fines, penalties or forfeitures incurred under 19 U.S.C. 1592, district directors have been granted the authority by Customs to mitigate or remit when the total amount of

those fines, penalties or forfeitures does not exceed \$25,000. Treasury Decision 85-25 did not change this amount so § 171.21 still provides for the \$25,000 limitation in § 1592 cases.

Customs now believes that Customs field officers are fully qualified to make decision on petitions in cases involving § 1592 penalty assessments of \$50,000 or less. Customs bases this view on the degree of training that field officers have received and the overall improvement in the Fines Penalties and Forfeiture (FPF) program.

SUPPLEMENTAL PETITIONS

Pursuant to §§ 171.33 and 172.33 (19 CFR 171.33, 172.33), regional commissioners of Customs are currently empowered to consider supplemental petitions for relief in all cases acted upon by district directors, including cases arising under 19 U.S.C. 1592 when the total amount does not exceed \$25,000, and supplemental petitions for relief arising from claims for liquidated damages when the total amount does not exceed \$50,000. Except for penalty cases arising under § 1592, this document proposes to increase the field jurisdiction over supplemental petitions in both penalty cases and claims for liquidated damages, in §§ 171.33 and 172.33, respectively, to \$100,000. For penalty cases incurred under § 1592, the document proposes to increase the authority of field officers to make decisions on supplemental petitions for relief when the amount does not exceed \$50,000.

Headquarters jurisdiction over these supplemental petitions no longer is needed to maintain oversight of field operations, since the same functional responsibilities can be accomplished through the Automated Commercial System (ACS) and the FPF module that has been implemented therein, as well as through TECS II. Since the time of the last delegation to the field, there has been an increase in monitoring of field personnel by Headquarters, most notably illustrated through the creation of a Fines, Penalties, and Forfeiture Branch in the Office of Trade Operations at Headquarters, which serves this very purpose. Moreover, as was promised in connection with the delegation granted under T.D. 85-25, there has been extensive training of FPF personnel in field offices.

CERTAIN LIQUIDATED DAMAGE CLAIMS

For certain liquidated damages claims the district director is given full authority to act upon the claim, without regard to the amount of the claim. These claims, which include most notably the failure to file timely entry summaries, are outlined in § 172.22, Customs Regulations (19 CFR 172.22). This document proposes to add a new subsection (e) to § 172.22 that would include cases arising under section 18.2(c)(2), Customs Regulations (19 CFR 18.2(c)(2)), for merchandise traveling under bond. Non-compliance with the time limits described therein generally results in the assessment of a claim for liquidated damages. The district director is delegated au-

thority to handle these cases, regardless of amount, in accordance with guidelines published by the Commissioner of Customs.

BROKER PENALTIES

This document also proposes to amend § 171.21 to specifically set forth an exception to the \$100,000 delegation of authority to the field to mitigate penalties. The document proposes that the district directors may mitigate penalties incurred under the provisions of § 641(b)(6) or § 641(d)(1), Tariff Act of 1930, as amended (19 U.S.C. 1641(b)(6) and 1641(d)(1)) and assessed under § 641(d)(2)(A) (19 U.S.C. 1641(d)(2)(A)) when the total amount of penalties does not exceed \$10,000. Authority to review supplemental petitions would lie with the Regional Commissioner for penalties which do not exceed \$10,000, pursuant to a proposed amendment to § 171.33. Broker penalties over \$10,000 are mitigated by the Director, Regulatory Procedures and Penalties Division.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Although this document is being issued with notice for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553, because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

EXECUTIVE ORDER 12291

Because this document is related to agency organization and management it is not subject to E.O. 12291.

DRAFTING INFORMATION

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 10

Customs duties and inspection; Imports.

19 CFR Part 18

Customs duties and inspection; Bonded shipments.

19 CFR Part 125

Customs duties and inspection; Delivery and receipt.

19 CFR Part 171

Customs duties and inspection; Administrative practice and procedures; Penalties; Seizures and forfeitures.

19 CFR Part 172

Customs duties and inspection; Administrative practice and procedures; Liquidated damages.

PROPOSED AMENDMENTS TO THE REGULATIONS

Accordingly, it is proposed to amend Parts 10, 18, 125, 171, and 172, Customs Regulations (19 CFR Parts 10, 18, 125, 171, and 172) as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * *

2. In § 10.39(e), remove the word "regulation" in the first sentence and add, in its place, the word "paragraph", and in the second sentence remove the amount "\$50,000" and add, in its place, "\$100,000".

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The general authority for Part 18 and relevant specific authority continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1551, 1552, 1553, 1624; * * *

§ 18.8 also issued under 19 U.S.C. 1623;

* * * * *

2. In § 18.8(d) remove the amount "\$50,000" and add, in its place, "\$100,000".

PART 125—CARTAGE AND LIGHTERAGE OF MERCHANDISE

1. All authority citations set forth at the end of the individual sections of Part 125 are removed and the authority citation at the beginning of Part 125 is revised to read as follows:

Authority: 19 U.S.C. 66, 1535, and 1624.

§ 125.31 also issued under 5 U.S.C. 301; 19 U.S.C. 1311, 1312, 1484, 1555, 1556, 1557, 1623, and 1646a.

§ 125.32 also issued under 5 U.S.C. 301; 19 U.S.C. 1484.

§ 125.33 also issued under 19 U.S.C. 1311, 1312, 1555, 1556, 1557, 1623, and 1646a.

§§ 125.41 and 125.42 also issued under 19 U.S.C. 1623.

2. In § 125.42 remove the amount "\$50,000" and add, in its place "\$100,000".

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The general authority citation for Part 171 continues to read as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624.

2. Section § 171.21 is revised to read as follows:

§ 171.21 Petitions acted on by district director.

The district director may mitigate or remit fines, penalties, and forfeitures incurred under any law administered by Customs, with the exception of penalties or forfeiture incurred under the provisions of sections 592 and 641(b)(6) or (d)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1592 and 1641(b)(6) or (d)(1)), on such terms and conditions as, under the law and in view of the circumstances, he shall deem appropriate, when the total amount of the fines and penalties incurred with respect to any one offense, together with the total value of any merchandise or other article subject to forfeiture or to a claim for forfeiture value, does not exceed \$100,000. The district director may mitigate or remit fines, penalties, or forfeitures incurred under 19 U.S.C. 1592 when the total amount of those fines, penalties or forfeiture does not exceed \$50,000. The district director may mitigate penalties incurred under 19 U.S.C. 1641(b)(6), 1641(d)(1), and assessed under § 1641(d)(2)(A) when the total amount of the penalties does not exceed \$10,000.

3. In section 171.33, paragraph (b)(1) and the heading of paragraph (d) are revised to read as follows:

§ 171.33 Supplemental petitions for relief.

* * * * *

(b) Consideration.

(1) *Decisions of the district director.* Where a supplemental petition requests further relief from a decision of the district director, he may grant additional relief, if he believes it is warranted, in cases in which he has the authority to grant relief in accordance with the provisions of section 171.21. Supplemental petitions for further relief in cases initially decided by the district director in accordance with the provisions of section 171.21, together with all per-

tinent documents, shall be forwarded to the regional commissioner of the region in which the district lies if:

(A) there has been a specific request by the petitioner for review by the regional commissioner; or

(B) the district director believes no additional relief is warranted.

* * * * *

(d) *Appeals to the Secretary of the Treasury.*

PART 172—LIQUIDATED DAMAGES

1. The authority citation for Part 172 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

2. Section 172.22 is revised by adding paragraph (e) to read as follows:

§ 172.22 Special cases acted on by district director of Customs.

* * * * *

(e) *Failure to timely deliver merchandise traveling in-bond.*

(1) If merchandise traveling under bond is not delivered to the port of destination or exportation within time limits established by sections 18.2(c)(2), 122.119(b) or 122.120(c) of this chapter and liquidated damages are assessed for violation of the provisions of section 18.8(b) of this chapter, notwithstanding other delegations of authority, the demand shall be cancelled by the district director in accordance with guidelines issued by the Commissioner of Customs.

(2) If the in-bond manifest is not delivered to the district director as required by sections 18.2(d) or 18.7(a) of this chapter and liquidated damages are assessed for violation of the provisions of section 18.8(b) of this chapter, notwithstanding any other delegation of authority, the demand shall be cancelled by the district director in accordance with guidelines issued by the Commissioner of Customs.

3. Section 172.33(b)(1) is revised to read as follows:

§ 172.33 Supplemental petitions for relief.

* * * * *

(b) *Consideration.*

(1) *Decisions of the district director.* Where a supplemental petition requests further relief from a decision of the district director, he may grant additional relief, if he believes it is warranted, in cases in which he has the authority to grant relief in accordance with the provisions of section 172.21. Supplemental petitions for further relief in cases initially decided by the district director in accordance with the provisions of section 172.21, together with all pertinent documents, shall be forwarded to the regional commissioner of the region in which the district lies if:

(A) there has been a specific request by the petitioner for review by the regional commissioner; or

(B) the district director believes no additional relief is warranted.

* * * * *

CAROL HALLETT,
Commissioner of Customs.

Approved: August 1, 1990.

PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, August 8, 1990 (55 FR 32265)]

U.S. Court of Appeals for the Federal Circuit

RICHARDS MEDICAL CO., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 89-1693

(Decided August 3, 1990)

Lester L. Hewitt and Paul E. Krieger, Pravel, Gambrell, Hewitt, Kimball & Krieger, of Houston, Texas, argued for plaintiff-appellee. With them on the brief was *Eugene R. Montalvo*.

Joseph I. Leibman, Attorney in Charge, International Trade Field Office, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director.

Appealed from: U.S. Court of International Trade.

Judge WATSON.

Before *RICH*, Circuit Judge, *BALDWIN*, Senior Circuit Judge, and *WILL*, Senior District Judge.*

RICH, Circuit Judge.

The United States Customs Service (Customs) appeals from the June 27, 1989 Judgment of the United States Court of International Trade (CIT), Court No. 84-10-01337, ordering Customs to liquidate certain medical instruments imported by Richards Medical Company (Richards) in accordance with item 960.15 of the Tariff Schedule of the United States (TSUS). The CIT's opinion is reported at *Richards Medical Co. v. United States*, 720 F. Supp. 998 (CIT 1989). We affirm.

BACKGROUND

In 1982, Congress passed the Educational, Scientific, and Cultural materials Importations Act of 1982¹ (the Act), providing for temporary duty-free entry of various merchandise, including "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons." This particular exemption from duty was subsequently inserted as items 960.10,

*Senior Judge Hubert L. Will of the Northern District of Illinois, sitting by designation.

¹Pub. L. 97-446, 96 Stat. 2346 (1982).

960.12 and 960.15 of the TSUS. Also, as provided by the Act, the following was inserted as Headnote 2 of Part 4 of TSUS Schedule 9:

2. For the purpose of items 960.10, 960.12, and 960.15—

(a) The term "*physically or mentally handicapped persons*" includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(b) These items do not cover—

- (i) articles for acute or transient disability;
- (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled;
- (iii) therapeutic and diagnostic articles;
- and
- (iv) medicines or drugs.

Richards imported three different kinds of hip prosthesis systems (the Autophor, Spectron, and Xenophor systems), as well as medical instruments specifically designed and sold for use with the different kinds of systems. Customs classified the hip prosthesis systems under item 960.15, TSUS,² thus entitling them to duty-free treatment, but classified the instruments under item 709.27, TSUS.³ Customs denied the subsequent protests by Richards seeking classification of the instruments under item 960.15, on the grounds that they were "therapeutic," and thus ineligible for classification under item 960.15 by headnote 2(b)(iii).⁴

Richards appealed the classification of the instruments to the CIT. Upon review of the statutory language and the limited legislative history, the CIT concluded that the term "therapeutic" in the Act distinguishes articles which are used to heal the condition causing a handicap (therapeutic) from articles which are merely designed to compensate for, or adapt to, the handicapped condition (not therapeutic). *Richards Medical*, 720 F. Supp. at 1000. The CIT further found that a hip prosthesis does not heal handicapped persons nor cure the disease which caused the handicap, and thus is not therapeutic within the meaning of the Act. Since, concluded the CIT, the medical instruments have no other use than with the prosthesis systems and are used for the benefit of handicapped persons, classification of the instruments under item 960.15 was warranted. Customs appealed.

²TSUS 960.15 reads: "Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons (however provided for in schedules 1 to 7) * * * Other."

³Item 709.27, TSUS reads:

Medical, dental, surgical and veterinary instruments and apparatus (including electromedical apparatus and ophthalmic instruments), and parts thereof * * * Other * * * Other.

⁴Customs now maintains that the hip prosthesis systems themselves should also not have been classified under item 960.15 for the same reason, but that it cannot now change the classification of that merchandise which has been liquidated without protest.

OPINION

What appears at first to be a single issue—are instruments used to implant hip prostheses therapeutic—is actually two issues: (1) what is the meaning of therapeutic within the context of the Act; and (2) are instruments used to implant hip prostheses within that meaning. The first issue is a question of law subject to review de novo, and the second issue is a question of fact subject to the clearly erroneous standard. *Hasbro Industries, Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989).

The first issue, that of the meaning of "therapeutic," is essentially an issue of statutory construction. As with all questions of statutory construction, we start first with the plain meaning of the statute, and then go to other extrinsic aids such as legislative history if necessary. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988).

Customs' primary argument with respect to the plain or common meaning of the word "therapeutic" is that it is not limited to treatments which are intended to be curative, but also encompasses treatments which are alleviative or palliative. In support of this argument, Customs relies not only on numerous dictionary and encyclopedia definitions, but also on prior case law involving the meaning of "therapeutic" in other statutes. For example, *J.E. Bernard & Co. v. United States*, 58 Cust. Ct. 23, 28, C.D. 2872 (1967) indicates that "therapeutic qualities embrace the alleviative or palliative, as well as the curative or healing qualities."

However, the only conclusion we can reach after reviewing the various definitions from different sources which the parties have provided for us is that the word "therapeutic" has many different meanings and is subject to both broad and narrow interpretations. The question is, which definition best invokes the intent of Congress?

The legislative history is not very helpful on this point. However, one example of an item which is not "therapeutic" is given, and this example definitely cuts against construing this term broadly to include alleviative or palliative treatments, i.e., treatments which help the handicapped person live with his or her handicapped condition. In particular, the Senate Report accompanying the Act indicates that an automobile fitted with special seats for use by the handicapped or with special attachments to permit a handicapped person to operate the automobile are indicated as being within the scope of the Act. S. Rep. No. 564, 97th Cong., 2d Sess. 20, reprinted in 1982 U.S. Code Cong. & Admin. News 4077, 4097. However, such a specially-equipped automobile is certainly "alleviative" in the sense that it helps the handicapped person to live with the handicap by helping him or her to ride in or drive a car. Thus, to interpret the word "therapeutic" broadly to include "alleviative" would be inconsistent with the one specific example in the legislative history.

In fact, our impression after reading the legislative history is that the CIT drew a very proper distinction in this case. Congress intended to encourage the importation of that merchandise which is designed to compensate for, or help adapt to, the handicapped condition. At the same time, Congress did not want to allow duty-free importation of merchandise which is used to heal or cure the condition causing the handicap.

Which brings us the second, factual issue: does a hip prosthesis (and consequently the instruments used to implant it) heal or cure a person with a handicap or does it merely allow the handicapped person to better compensate for the handicap? The answer to this question lies heavily in how one defines the underlying condition. Customs argues that a person in need of hip replacement suffers from an inoperative hip. Thus, they conclude, it is "difficult to imagine a better 'cure' for a diseased hip than the insertion of brand new components to replace the area affected by disease." Appellant's Brief at 15. Richards, on the other hand, points out that a person who needs a hip prosthesis because he or she suffers from, for example, severe arthritis still has arthritis after the operation. The prosthesis merely allows the person to better compensate for the arthritis.

In concluding that hip prostheses merely help handicapped persons adapt to their condition, the CIT relied heavily on the parties' stipulation before trial that:

The Prosthetic Systems are implanted in physically handicapped persons in order to improve their ability to walk or even to allow them to walk when they were severely crippled prior to implantation * * *

The CIT noted that the implantation of prosthetic hips is performed *because of* the incurable nature of the underlying disease, and that the replacement of the hip joint is a "compensatory remedy of a disability and not a therapy." *Richards Medical*, 720 F. Supp. at 1001.

We do not find these factual conclusions to be clearly erroneous. Therefore, we *affirm* the CIT's conclusion that the instruments used to implant the prostheses are not therapeutic and thus are classifiable under item 960.15, TSUS.

AFFIRMED

ROSEMOUNT, INC., APPELLANT v. U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND SMAR EQUIPMENT AND SMAR INTERNATIONAL CORP., INTERVENORS-APPELLEES

Appeal No. 90-1263

(Decided August 2, 1990)

John F. Flannery, Fitch, Even, Tabin & Flannery, of Chicago, Illinois, argued for appellant. With him on the brief was *R.S. Pinkstaff*. Also on the brief were *Paul Plaia, Jr.* and *Cecilia H. Gonzalez*, Howrey & Simon, of Washington, D.C.

Jean H. Jackson, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With her on the brief were *Lyn M. Schlitt*, General Counsel and *Wayne W. Herrington*, Acting Assistant General Counsel and *James A. Toupin*.

Larry Klayman, Klayman & Associates, P.C., of Washington, D.C., argued for intervenors-appellees. With him on the brief was *Jeffrey A. Orr*.

Appealed from: U.S. International Trade Commission.

Before NIES, Chief Judge, MILLER, Senior Circuit Judge, and ARCHER, Circuit Judge.

NIES, Chief Judge.

I

Rosemount, Inc., appeals from the United States International Trade Commission's order, *In the Matter of Certain Pressure Transmitters*, Inv. No. 337-TA-304 (March 19, 1990), denying Rosemount's motion for temporary relief in a proceeding under section 337 of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1337). Rosemount is seeking relief during the pendency of the investigation (termed "temporary relief" in ITC practice) into its complaint alleging infringement of claims 1-4 of its U.S. Patent No. 3,800,413 ('413 patent). The alleged violation involves the importation of certain pressure transmitters by SMAR Equipment and SMAR International Corporation which were produced abroad by means of a process allegedly covered by the aforementioned claims of the '413 patent. Although the administrative law judge concluded that temporary relief was warranted in view of Rosemount's strong showing of likelihood of success on the merits of its charge of infringement and the public policy in favor of protecting patent rights, the Commission did not agree. The Commission held that the presumption of irreparable harm to which Rosemount was entitled was rebuttable by the evidence SMAR presented of actual market conditions and other factors and was, in fact, rebutted here. Upon balancing the respective harm to the parties as shown by the evidence if temporary relief were granted, the Commission concluded temporary relief should be denied. We affirm.

II

The authority of the ITC to grant temporary relief in a section 337 proceeding is set forth in 19 U.S.C. § 1337(e) (1988), which provides in pertinent part:

(1) If, during the period of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States and United States consumers, it finds that such article should not be excluded from entry * * *

(3) The Commission may grant preliminary relief under this subsection or subsection (f) of this section to the same extent as preliminary injunctions and temporary restraining orders may be granted under the Federal Rules of Civil Procedure.

To grant the equitable relief of an injunction prior to trial, a district court traditionally considers and balances the factors of: (1) the movant's likelihood of success on the merits; (2) whether or not the movant will suffer irreparable injury during the pendency of the litigation if the preliminary injunction is not granted; (3) whether or not that injury outweighs the harm to other parties if the preliminary injunction is issued; and (4) whether the grant or denial of the preliminary injunction is in the public interest. *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, No. 90-1119, slip. op. at 2 (Fed. Cir. June 20, 1990); 7 J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶65.04[1] (2nd Ed. 1990). In this case, the ITC brought its practice into line with the standard of the district courts to the extent it had previously varied therefrom. We agree with the ITC that the exercise of its temporary relief authority should generally parallel that of the district courts.¹ On appellate review, we must determine whether in granting or denying temporary relief the Commission abused its discretion. *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, No. 90-1119, slip. op. at 3. Under that standard, we may set aside the decision under review if it rests on the foundation of an erroneous understanding of the law or on clearly erroneous findings of fact. If no material legal or factual error is discerned, we may set aside a decision committed to the discretion of the reviewed tribunal only if it committed a clear error of judgment, that is, its decision, based on the facts, is patently unreasonable, arbitrary, or fanciful. See *PPG Indus. v. Celanese Polymer Specialties*, 840 F.2d 1565, 6

¹We also agree with the government that the elimination of the requirement of "substantial injury" to establish a violation of section 337 by the 1988 amendments to the Trade Act does not affect the standard for the grant of temporary relief during the section 337 investigation. See 19 U.S.C. § 1337(e)(3).

USPQ2d 1010 (Fed. Cir. 1988), *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1022, 228 USPQ 927, 930 (Fed. Cir. 1986).

III

The principal issue raised by Rosemount on appeal is that the Commission committed an error of law in determining that the presumption of irreparable harm, which was afforded to Rosemount by its strong showing of success on the merits (*see Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581, 219 USPQ 686, 692 (Fed. Cir. 1983)), was rebuttable by evidence of what *actual* damage was likely. Here, the Commission found that the presumption of irreparable harm had been rebutted by evidence of Rosemount's delay in bringing this action, its grant of two licenses, its large market share as compared to the miniscule share of SMAR, the presence of twelve major noninfringing competitors in the U.S. market, and the availability of a damage remedy in district court. The Commission further found that Rosemount's U.S. market share had experienced a growth rate in sales for the two previous fiscal years and was expected to increase its share over the next four to five years, whereas SMAR's very small U.S. market share was unlikely to increase during the pendency of this investigation. It further rejected Rosemount's argument that a presumption of irreparable harm could be overcome only by evidence that the accused infringer had stopped importation.

With respect to the factor of harm to the movant, this court has recognized that, in appropriate circumstances, a presumption of irreparable harm may be afforded a patent owner where that party has made a strong preliminary showing of patent validity and continued infringement in connection with its request for relief *pendente lite*. *Smith Int'l, Inc. v. Hughes Tool Co.*, 718 F.2d at 1581, 219 USPQ at 692. However, like any other presumption of fact,² a presumption of irreparable harm to a patent owner does not override the evidence of record. *See Maggio v. Zeitz*, 333 U.S. 56, 66 (1947) ("a 'presumption of fact,' is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved * * * . [R]ules of evidence as to inferences from facts are to aid reason, not to override it"); *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, No. 90-1119, slip. op. at 3-4 (presumption of irreparable harm is, like all presumptions, rebuttable"); *Panduit Corp. v. All States Plastics Mfg. Co.*, 744 F.2d 1564, 1579 223 USPQ 465, 475 (Fed. Cir. 1984) ("A presumption does not enjoy the status of evidence. If a finding on the evidence is made that a presumed fact has been effectively rebutted, the presumed fact ceases to exist.").

²In *Roper Corp. v. Litton Systems Inc.*, 757 F.2d 1206, 1272, 225 USPQ 345, 349 (Fed. Cir. 1985) the presumption is termed a "legal presumption." We understand this to mean only that the presumption is judge-made and in that sense "legal." The presumption itself relates to the fact of injury. *See Matsushita Elec. Indus. Co. v. United States*, 823 F.2d 806, 808 (Fed. Cir. 1987).

Rosemount argues that the ITC improperly considered the evidence SMAR offered of actual damage because the presumption of irreparable harm can be overcome only by evidence of cessation of importation of the accused products. That argument is clearly untenable. Rosemount seems to be saying that an accused party could defeat the presumption which arises only where there is continuing infringement in instances where the presumption would not arise. We reject this "Heads-I-Win, Tails-You-Lose" argument.

Thus, we conclude that the ITC properly took into consideration all of the evidence relating to Rosemount's actual harm when it determined "that any harm complainant may experience during the remaining period of investigation by reason of respondent's imports would not be irreparable harm" (*In the Matter of Certain Pressure Transmitters*, Inv. No. 337-TA-304, at 37), and that that finding is supported by substantial evidence. Further, we do not find any error in the Commission's evaluation that the balance of actual harm in this case "tips in favor of [SMAR]."

IV

We also agree with the Commission's rejection of the view that the public interest inevitably lies on the side of the patent owner because of the public interest in protecting patent rights, although that is one factor to consider and may be a dominant factor. The power to grant exclusionary relief is given because of that public interest, but other public interest factors are delineated in the above-quoted section 1337(e)(1) and must be taken into account. In this case, the Commission found that there was no public interest factor except the protection of Rosemount's patent, and it took that factor into consideration in its ultimate decision.

Finally, we find it unnecessary to address SMAR's challenge to the Commission's determination of Rosemount's strong likelihood of success in proving patent validity and infringement. SMAR argues that we overturn or at least vacate this part of the Commission's decision. It is unnecessary to do so inasmuch as we agree with the denial of temporary relief on the bases that Rosemount failed to establish irreparable harm and that the balance of harm tilts in favor of SMAR. See *Roper Corp. v. Litton Systems, Inc.*, 757 F.2d at 1271, 225 USPQ at 348 (court need not decide the infringement issues where patentee failed to meet other criterion). Moreover, the Commission expressly rejected SMAR's argument that the Commission will consider the preliminary findings on the merits as law of the case at a later stage of proceedings unless vacated or reversed by this court. Cf., *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (findings and conclusions on a preliminary injunction are not binding at trial on the merits).

V

In sum, the Commission's determination to deny temporary relief on balance of the four pertinent factors was not an abuse of discretion. The decision is based on a correct interpretation of the law, on findings supported by substantial evidence, and is reasonable on the facts of this case.

AFFIRMED



United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90-67)

NAKAJIMA ALL CO., LTD., PLAINTIFF, AND SEARS ROEBUCK CO., INTERVENOR-
PLAINTIFF U. UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., INTER-
VENOR-DEFENDANT

Court No. 87-01-00089

OPINION AND ORDER

[Plaintiff's motion for judgment on the agency record granted in part; remanded to the International Trade Administration.]

(Decided July 20, 1990)

McDermott, Will & Emery (R. Sarah Compton, Kurt T. Olson, Patrick J. Cumberland and David J. Levine); Patton, Boggs & Blow (Frank R. Samolis, Michael D. Esch and Jeffrey L. Turner) and Benjamin L. Irvin, of counsel, for the plaintiff.

Barnes, Richardson & Colburn (Robert E. Burke and Brian F. Walsh) for the intervenor-plaintiff.

Stuart M. Gerson, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Velta A. Melnbrensis); and Offices of the Deputy Chief and the Chief Counsel for Import Administration, U.S. Department of Commerce (Lisa B. Koteen and Pamela Green) for the defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and John M. Breen); Robert E. Walton, Esq., Smith Corona Corporation, of counsel, for the intervenor-defendant.

AQUILINO, Judge: The plaintiff has interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Portable Electric Typewriters From Japan; Final Results of Antidumping Duty Administrative Review*, 52 Fed. Reg. 1,504 (Jan. 14, 1987). One of those results was a dumping margin of 16.40 percent for Nakajima portable electric typewriters ("PETs") sold or imported into the United States during the period May 1, 1981 to April 30, 1982 which the plaintiff contends is unsupported by substantial evidence on the record and otherwise not in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B). Jurisdiction of the court is pursuant to 28 U.S.C. § 1581(c).

I

On May 9, 1980, the ITA published an antidumping-duty order covering PETs from Japan, 45 Fed. Reg. 30,618. The margin of dumping set forth therein for the plaintiff was 4.36 percent. Thereafter, pursuant to 19 U.S.C. § 1675, the agency conducted an administrative review of its order, first covering the period January 30–April 30, 1980. It concluded that the margin for those months was 0.27 percent or *de minimis* and thus determined not to require cash deposits of estimated antidumping duties on subsequent entries of plaintiff's PETs. *Set Portable Electric Typewriters from Japan; Final Results of Administrative Review of Antidumping Duty Order*, 47 Fed. Reg. 33,306, 33,308 (Aug. 2, 1982).

During the review proceedings, the petitioner Smith-Corona Group, Consumer Products Division, SCM Corporation had argued that foreign-market value be based on home-market rather than third-country sales and furnished the ITA with a voluminous market research report in support of its position that there were reasonable grounds for the agency to believe or suspect that the Nakajima sales under consideration had been below the cost of production, thereby requiring that the merchandise's foreign-market value be constructed. The ITA disagreed that sales in the home market should be the basis of comparison and further stated that it had

received and verified cost of production information for 1980 on merchandise produced by Nakajima * * * for sale to countries other than the U.S. A review of this information revealed that there were no sales below the cost of production. *Id.* at 33,307.

In conjunction with the second administrative review, covering the year May 1, 1980 through April 30, 1981, the petitioner again sought to impress upon the agency its previous position, based for the most part on the research report. The ITA again disagreed, responding that:

SCM did not adequately comply with the Department's request for proper source and background information for the market research report. Therefore, we did not conduct a further investigation of Nakajima's cost of production. Moreover, we maintain that we conducted a thorough verification of all elements of Nakajima's cost of production and are satisfied that all appropriate costs are included. The verified cost of purchased parts included material and labor, and were arms-length transactions. We verified that the labor costs were for all steps of the Nakajima production process. We did not accept Nakajima's reported method of allocating indirect labor, thereby increasing the overall unit labor costs. Concerning SCM's allegation that related parties incurred certain expenses, we did not pursue this issue again because of difficulties with the market research report.

Portable Electric Typewriters From Japan; Final Results of Administrative Review of Antidumping Duty Order, 48 Fed. Reg. 40,761, 40,767 (Sept. 9, 1983). Those results included a weighted-average margin of 0.17 percent for plaintiff's PETs which was *de minimis* and led the agency to continue the waiver of any cash deposits for that merchandise. See *id.* at 40,768.

II

At issue in this action is the third administrative review, which covered the year May 1, 1981 through April 30, 1982 and plaintiff's PET models 7500, M100, 8500, 8600 and 8800C, in order of ascending sophistication.¹ The plaintiff contests not only the final results of that review but also the ITA's conduct leading to them. Hence, it is appropriate to describe the proceedings in some detail.

In March 1983, Nakajima filed responses to the ITA's questionnaire, ConfDoc 3, which indicated no or *de minimis* margins of dumping during the year under review. The agency scheduled verification of those responses and invited comments on them from the petitioner, which submitted a brief in November 1983, taking the position once more that home-market, rather than third-country, sales should be used to determine foreign-market value and also that the sales in the home market had been below the cost of production. The SCM research report was resubmitted to the ITA upon an offer to "attempt to provide whatever additional information is deemed necessary by the agency". ConfDoc 22 at 6.

This time, the ITA agreed to base foreign-market value on home-market sales, in view of the questionnaire responses, and it also decided to require verification of Nakajima's costs of production. See ConfDoc 24. Accordingly, the agency wrote to counsel:

*** Since the cost of production information was not required as part of our original questionnaire, please have a non-confidential version of Nakajima's cost data for fiscal year 1982 available at the verification.²

Verification took place in Japan in March 1984, with the ITA team's reporting that, "[a]lthough some errors and differences were found (considered negligible)", Nakajima "was able to substantiate" its questionnaire responses. ConfDoc 28 at 15. As for investigation of the costs of production, the team focused on the model 8800C. The company apparently made available a listing of production costs for that machine, including those for materials and labor, factory overhead, selling expenses, and assembly by a related company, all of which the team proceeded to verify. The report was explicit as to the methods used to accomplish the verification of the information presented, and traced each category of specific cost claimed on the 8800C to data filed with various Japanese ministries. See

¹Of those models, the most-sophisticated 8800C was also most important in terms of sales volume and value. Compare confidential document ("ConfDoc") 3, p. 9 with *id.* at 6-8 and 10.

²Public Record Document ("R.Doc") 104 at 3.

generally ConfDoc 124. The report stated, among other things, that the production costs for the model 8600 were approximately the same as for the 8800C and that, since "all [PETs] go through the same production line", the labor cost applicable to the model 8800C was the same for all electric models. *Id.* at 2.

After this verification, in May 1984, Nakajima applied for revocation of the antidumping-duty order as against it in view of the lack of any actionable dumping during the preceding two years. *Cf.* 19 C.F.R. § 353.54 (1984). The record does not indicate that the ITA formally ruled on this application, only that it would not require further administrative-review questionnaire responses from the company pending disposition of the request. *See* R.Doc 117. Then, in March 1985 the agency referred to "changed circumstances" without any explanation³, and the respondent was thereafter notified that, in order to "proceed with analysis of the cost of production data already submitted", the ITA needed additional information on the "normal leadtime" between the purchase of materials, the production process and the actual shipments of the finished products, and also confirmation that the leadtime was the same for both the home and U.S. markets. R.Doc 179.

The respondent answered that there had been only one or two production runs for the home market which covered several months' requirements, that the leadtime for shipment of PETs in that market was the same as for the U.S., that basic materials had been purchased in large volumes, resulting in virtually stable prices, and that practically all of the purchasing for the machines sold during the review period had occurred during its fiscal year. *See* R.Doc 192.

Nevertheless, the ITA indicated that it would re-investigate the costs of production for the review period. The reason given was that the agency files did not reflect submission of cost data for fiscal year 1981 and of selling and general expenses for calendar year 1981. The company insisted that the ITA had already determined it had not sold below cost during 1981-82 and that the agency possessed all the information needed to complete the investigation. Counsel also pointed to the verification report of October 30, 1982 in which the ITA had stated that it "ha[d] found no sales below cost of production" and to the fact that all materials costs for fiscal year 1981 had been verified in May 1984. *See* R. Docs 380, 381. But Nakajima was formally notified by letter dated June 25, 1985 that "additional information on the cost-of-production of merchandise sold during the period" was necessary to complete the review. Specifically, the ITA requested information on the cost of all materials necessary for PET production, plus transportation; the cost of fabrication (direct and indirect labor, direct and indirect manufacturing); and general expenses. *See* R.Doc 200.

³See R.Doc 163.

The information was provided on July 8, 1985. The agency scheduled verification at Nakajima's Tokyo office for July 17 and at its factory in Nagano on July 18-19, 1985. However, the team was apparently delayed at another Japanese manufacturer and then went directly to Nagano on July 18th. The next day, the team allegedly came to the conclusion that it was "getting nowhere"⁴ and departed. Its report on the visit, filed some six months later (in January 1986), states:

Our purpose in conducting this verification at the Nagano [*sic*] factory was to verify cost of production data. We were unsuccessful in our attempt from the beginning.

ConfDoc 93 at 4. Nevertheless, as the report indicates, the "intended approach to verification * * * was to reconcile costs incurred in the production of portable electric typewriters to a set of audited financial statements" [*id.* at 2], and such statements were in fact produced by Nakajima along with considerable other documentation, which apparently was not looked at by the team.

In any event, after the report had been rendered, the respondent sought to reconcile discrepancies contained therein. However, in April 1986 the ITA informed the petitioner that it was "considering the use of best information available to determine Nakajima's U.S. price and foreign market value". R.Doc 256. SCM referred anew to its research report, ConfDoc 1.

The ITA published the preliminary results of its review on July 1, 1986, reciting its reported inability to verify Nakajima's costs of production and stating that therefore it had

calculated foreign market value for that firm based on the best information available. The best information available was petitioner-submitted data on constructed value.

Portable Electric Typewriters From Japan; Preliminary Results of Antidumping Duty Administrative Review, 51 Fed. Reg. 23,804, 23,805. In other words, the previously-rejected research report was accepted at face value, which provided a basis for a margin of 23.41 percent for Nakajima.

Again, the respondent spent the ensuing months attempting to reconcile differences. Among other points pressed was the agency's failure to take into account the data for the key model 8800C which had been verified more than two years earlier. In the end, the ITA reversed itself as to that PET though not otherwise:

* * * [W]e have confined our use of Nakajima's data to that which was specifically verified. Thus, we have accepted only Nakajima's costs on one model, 8800c. The costs for this model were verified in a report from our Tokyo office dated May 18, 1984. For all other models produced we have used the best information available.

⁴R.Doc 344 at 123.

52 Fed. Reg. at 1,510. But that information, set forth in the petitioner's market research report, did not specifically cover Nakajima models M100, 8500 and 8600, just the 7500 in addition to the 8800C. Thus, while accepting the verified data for that most-sophisticated model, the agency also chose the 8800C to serve as surrogate in the construction of value for the three middle models. However, in this regard, the research-report, as opposed to the verified, 8800C information was relied on.

As stated at the outset, the data combined resulted in a final dumping margin of 16.40 percent and also in this lawsuit.

III

The primary issue raised now is "[w]hether the Department's investigation of Nakajima's cost of production without the requisite reasonable suspicion was authorized by law." Plaintiff's Memorandum, p. 6.

The law implicated is the Trade Agreements Act of 1979, as amended. Subsection (a)(1) of 19 U.S.C. § 1677b provides, in part, that foreign-market value of imported merchandise shall be the price (A) at which such or similar merchandise is sold in the principal markets of the country from which exported, or (B), if not sold for home consumption or sold in such small quantities as to form an inadequate basis for comparison, then sold to countries other than the United States. Subsection (a)(2) states that, if the ITA concludes that foreign-market value cannot be determined as aforesaid, such value may be constructed as prescribed by 19 U.S.C. § 1677b(e). Furthermore:

Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—

(1) have been made over an extended period of time and in substantial quantities, and

(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,

such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

19 U.S.C. § 1677b(b). This is the provision placed most directly into focus for the foregoing issue the plaintiff raises.

A

On its part, the defendant questions the ability of the plaintiff to press this issue, arguing that it was not raised below and therefore is not appropriate on appeal. However, the record reveals objection on the part of the respondent to the ITA's decision to reinvestigate its costs of production. See, e.g., R.Docs 380 at 2 and 381; ConfDocs 82 at 1 and 117 at 1. Cf. *Hercules, Inc. v. United States*, 11 CIT 710, 730-31 673 F. Supp. 454, 473 (1987).

B

Essentially, plaintiff's position is that the only thing in the record which even arguably approached the necessary reasonable grounds for another cost-of-production investigation was the SCM research report. But that report was discredited and disregarded by the agency in prior proceedings. Hence, the plaintiff contends, it cannot now be equated with reason to suspect sales below cost of production. Plaintiff's Memorandum, pp. 63-65.

The defendant refers to *Connors Steel Company v. United States*, 2 CIT 242, 527 F. Supp 350 (1981); *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 575 F. Supp. 1277 (1983), *aff'd on other grounds*, 745 F.2d 632 (Fed. Cir. 1984); and *Huffy Corp. v. United States*, 10 CIT 214, 632 F. Supp. 50 (1986), in support of its position that it

can—and should—initiate a cost of production investigation when there is a timely, particularized allegation by the petitioner of sales below cost, but that the petitioner's allegation need not show substantial numbers of below-cost sales, just a reasonable basis to investigate.

Defendant's Memorandum at 35. Continuing, in this matter the

domestic manufacturer, SCM, alleged below cost sales and produced calculations which showed that Nakajima was selling its PETs in the home market at below cost of production prices * * *. Consequently, Commerce reasonably concluded that it had reasonable grounds to believe or suspect that Nakajima's sales in the home market had been made at prices which represented less than the cost of producing the merchandise in question * * *. *Id.* at 37-38 (citations omitted).

An agency has a duty, of course, to consider an allegation properly raised, and dispose of it one way or another. If proffered information provides a reasonable basis to believe the contention, the agency is obligated to attempt to confirm it through investigation. Under section 1677b(b), whether or not to follow up on an allegation of sales below cost hinges on the evidence submitted in support. See, e.g., *Monsanto Company v. United States*, 12 CIT —, —, 698 F. Supp. 285, 288-89 (1988). Because administrative pursuit of such a

contention necessarily invades a foreign manufacturer's confidential, proprietary information, threshold justification is a delicate matter indeed, and careful consideration is required in order to avoid unwarranted disclosure. Cf. *Yale Materials Handling Corp. v. United States*, 11 CIT 822, 674 F. Supp 865 (1987).

While it has been held that, to justify a cost-of-production investigation, section 1677b(b) requires "only a showing that sales have been made at below cost, not substantial sales", such a showing, nonetheless, must be made. *Huffy Corp. v. United States*, 10 CIT at 222, 632 F. Supp. at 57-58. In *Al Tech Specialty Steel Corp. v. United States*, 6 CIT at 246-47, 575 F. Supp. at 1279-80, the court pointed out

an instructive body of law stemming from the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, (1968), wherein courts have grappled with the slippery concept of "reasonable suspicion." The upshot has been the formulation of detailed guidelines for determining whether *vel non* such suspicion exists in a given case. The teaching of *Terry* and its progeny is that in order for reasonable suspicion to exist there must be "a particularized and objective basis for suspecting" the existence of certain proscribed behavior, taking into account the totality of the circumstances—the whole picture.⁵

In that case, the petitioner had presented the ITA with four pieces of information. Two of them, a foreign steel-industry press release and a European Commission paper, indicated that competitors in Europe, as a group, had incurred increases in raw-material and energy costs, but without increasing prices accordingly. The other two items were quotations from American trade papers characterizing the particular foreign producer as a "loss-making" operation. Taken as a whole, the court found that those items were too general in nature to tie the existence of loss in the foreign market to the specific merchandise under consideration, and it therefore upheld the ITA's perception that reasonable grounds were lacking for conduct of a cost investigation.

In *Connors Steel*, *supra*, the domestic petitioner had submitted (1) a trigger pricing mechanism showing sales of steel by the foreign manufacturer below the trigger price; (2) proof of its own costs of production in conjunction with its claim of approximately the same efficiency of production, which together tended to prove that the other manufacturer's sale price was below cost of production; and (3) a statement appearing in the foreign manufacturer's own annual report that on various occasions it had accepted orders at prices which did not cover even fixed costs. Nevertheless, Treasury declined to conduct a cost-of-production investigation. When the court considered the "whole picture", however, it disagreed that the peti-

⁵Footnote omitted; citing *United States v. Cortes*, 449 U.S. 411, 417 (1981), and *United States v. Merritt*, 695 F.2d 1263, 1268 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983). According to *Cortes*, the test is whether, based upon all the circumstances, an assessment of the "whole picture" yields a "particularized suspicion" about an individual's activities. 449 U.S. at 418.

tioner's proffer had not provided reason to suspect sales below cost, and it therefore remanded for an investigation of the foreign costs of production.

In this case, the defendant argues that the fact that the ITA

had determined that there were no sales below the cost of producing the relevant PETs during prior periods * * * does not mean that Commerce had no reasonable grounds to believe or suspect below cost sales during the period considered here. It is pertinent to note that in the previous periods foreign market value had been based on third country sales. This was the first review in which Commerce would rely upon home market sales for foreign market value, unless those sales were at prices below cost. Commerce, therefore, found it imperative to conduct a cost investigation * * *. If Commerce had again relied upon third country sales or had relied upon home market sales without pursuing well-documented allegations that the sales were at prices below the cost of production, it might not have been sufficiently diligent * * *.

* * * SCM * * * submitted particularized information dealing with Nakajima's PET models. That information was sufficient for Commerce to conclude that the elements required for the initiation of a cost of production investigation were present. The information did not have to establish that there in fact were below cost sales.

Defendant's Memorandum at 38-39 (footnote omitted).

However, consideration of such information should not occur in a vacuum but rather should encompass the whole picture the agency has acquired. Here, that picture included the information already garnered at the prior proceedings. The defendant allows that it investigated the same allegations during those proceedings without finding sales below cost. Of course, the relevance of those results for this case depends upon the circumstances of the ITA's decision to reinvestigate. Cf. *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984).

During the period under review, there had been an apparent increase in Nakajima's home-market sales from 4.6 to 6.6 percent of its total sales. The defendant claims it was "imperative" to conduct an investigation of the company's costs of production in light of that "changed circumstance" according to the following rationale:

* * * Since in this review, the petitioner alleged below cost sales in the home market and there was evidence that, for the first time, there were sufficient home market sales upon which to base foreign market value, if the home market sales were at prices above the cost of production, Commerce decided to initiate a cost of production investigation.

Defendant's Memorandum, p. 32. On its face, this mixes sales and costs. The process of determining foreign-market value initially should involve instead consideration of sales *qua* sales—before the separate matter of cost comes into play.

Be that as it may, the ITA is expert in enforcing the statute and is presumed, moreover, to have considered all pertinent information sought to be brought to its attention. *E.g.*, *Maine Potato Council v. United States*, 9 CIT 293, 301, 613 F. Supp. 1237, 1245, *appeal after remand*, 9 CIT 460, 617 F. Supp. 1088 (1985); *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984). But the court is in a position to determine if it has done so. *E.g.*, *Floral Trade Council of Davis, California v. United States*, 13 CIT —, —, 709 F. Supp. 229, 230 (1989).

As indicated, in the end the agency relied on the market research report, ConfDoc 1, submitted unchanged since the second administrative review and comprised of 172 pages of tables, summary statistics and generalized information pertaining to the Japanese PET industry as a whole and to the member manufacturers under investigation, the plaintiff included. The report's authorship is not shown, even on the confidential version, and there is no attestation of veracity or other indication of independent objectivity. The confidential version provides a general description of the methodology used to derive the manufacturing cost calculations, but much of it is based upon derivation and analogy. *See, e.g., id.* at 146. The report is detailed, although the only source mentioned for its breakdown of Nakajima's costs of production is a "Sept. report '81", which is referenced in conjunction with certain estimates deriving average wages per worker. *See id.* at 23–24. Whether the 1981 report was one of that company's own, or from some other source, is unclear.

In any event, SCM's report does not seem to enhance the credence of the allegation of sales of Nakajima PETs below cost. In the middle are three examples of sales at home, and in the end is a listing of production costs for the models 7500 and 8800C. The difference between those alleged costs and the corresponding sales information reported is only sales above the cost of production. *Compare id.* at 101–02 *with id.* at 172. Indeed, the intervenor-defendant admits that "Smith Corona repeatedly emphasized that . . . the market research report did not show below-cost sales of Nakajima's model 8800C."⁶ Hence, the conclusion the petitioner pressed appears to have come from comparing the Nakajima sales data, as reported in its questionnaire response, with the costs of production asserted in the research report.

Whatever the comparison, during both the preceding and the instant reviews, the ITS had verified information on Nakajima⁷ which conflicted with the data contained in the report, beclouding its im-

⁶Memorandum of Smith Corona Corporation in Response to Plaintiff's Motion for Judgment, p. 60.

⁷Thus, for example, the agency obtained verified information on materials costs through May 1981. *See* ConfDoc 113, Exhibit Z-3, Verification of 1980 "COP" For 8800, p. 8. Furthermore, the ITA's previous derivation

Continued

port and calling into question the propriety of using that data. For example, if the stated materials costs are compared with the agency's own materials-cost information for the same period, reliability appears to vary inversely with the degree to which the report's cost data vary from the ITA's verified or extrapolated information. Furthermore, when the report was submitted during the second administrative review, the petitioner indicated readiness to provide whatever source documentation the ITA requested. Such a request followed, but the petitioner was unable to supply that which the ITA deemed necessary, and the report was rejected as not sufficiently substantiated to justify further excursion into Nakajima's business per an agency letter in the record now before the court stating:

* * * On December 9, 1982, we notified you that the background and source information was inadequate and we requested further information. On December 30 * * * you responded to our request.

* * * While the information presented on December 30 * * * responds to certain questions, you did not comply with our request to furnish interview reports where the information was derived from interviews. Further, you did not supply the specific methodology and applicable data used to calculate the purchased parts amount for the model 7500 * * *. It was imperative that this information be submitted before we could consider such market research report data, especially when the data was received at the point it was in this proceeding.

In February 1982, before we conducted our on-site verification, we requested your input into verification preparations. On March 26, * * * you requested that we investigate five points with respect to Nakajima's cost of production. [We] examined those points which would affect the cost of production. We found that Nakajima had no equity or other interest in its subcontractors, that no Nakajima employee acted as an advisor or consultant to its subcontractors and that Nakajima did not provide any assists to its subcontractors for over four years. Because the transactions between Nakajima and its subcontractors are arms length we did not contact any of the subcontractors. Finally, we are interested in actual labor costs, which we verified. In your pre-hearing and post-hearing briefs, based on the market research report, you requested that we examine further points regarding Nakajima. Without the source documentation, we maintain that we do not have an adequate basis to do so.

Moreover, we are satisfied that we adequately verified each element of Nakajima's cost of production and that all costs are included. In each instance, we looked to randomly selected source documents and we traced individual items back to Nakajima's Ministry of Finance report. Therefore, concerning SCM's allegation of sales by Nakajima to West Germany below its cost of production, we will not use SCM's data.

of labor, general-selling and administrative costs during the preceding review also allowed for extrapolation, absent significant changed circumstances.

* * * *

In your December 30 * * * submission, you disagree that we have any legitimate need for any further information on the methodology and sources used by the market research organization and you comment that our request places an onerous burden on domestic producers. We maintain that these requests for source and methodology information are necessary to provide a sufficient basis for continuing an investigation where, as mentioned above, we either conducted a verification or the information is presented late in the review. Moreover, we do not believe that such requests place an unnecessary burden on the domestic producer; the market research firm must have used the requested data in preparing the report and the preparers of the report should be fully capable of furnishing the requested material to the party contracting for the report. R.Doc 68 at 2-3.

C

This letter properly states that an "unnecessary burden" had not been placed on the petitioner,⁸ and the record developed and now before the court does not reveal that the petitioner lived up to the burden it did have. Cf. *Huffy Corp. v. United States*, *supra*. What the record does reveal, in the final analysis, are home-market sales deemed by the ITA a sufficient basis for determination of foreign-market value under 19 U.S.C. § 1677b(a)(1)(A) and displeasure developed by the agency team during its brief visit to Nagano.

Of course, to believe or suspect is ephemeral and, according to the statute, for the mind of the administering authority. If differences between reasonable minds are not enough to reverse ITA perceptions in general, there is even less room for reversal when the difference is one of belief or suspicion. But the law does require *reasonable grounds* to believe or suspect, and this court cannot conclude that the record contains such grounds, particularly in view of the negative results of the ITA's investigations of the prior sales-below-cost allegations, including for the very year in question, and the absence of fresh information.

While the agency has broad discretion in the enforcement of the trade law, and its expertise is entitled to deference, more of a foundation had to have existed to satisfy the specific requirement, if not the spirit, of the governing statute. Cf. *Floral Trade Council of Davis, California v. United States*, 888 F.2d 1366, 1369-70 (Fed. Cir. 1989); *Monsanto Company v. United States*, 12 CIT at —, 698 F. Supp. at 288-89. All the team actually had to go on in July 1985 to visit Nagano was old contention, which had been previously discredited. That was the moment of essence. The displeasure developed after arrival thus does not count any more than do the other issues raised in this matter subsequent thereto, including (1) whether the

⁸Cf. *Bomont Industries v. United States*, 13 CIT —, —, 718 F. Supp. 958, 964 (1989) ("the provisions of the Trade Agreements Act of 1979 clearly express congressional intent that the administrative agency will obtain information through its own investigative efforts").

ITA, "having concluded that it was required by statute to use 'best information available,' erred by failing to use the 'best information' "9 and (2) "[a]ssuming arguendo that a cost of production investigation was warranted, whether the Department's premature and unjustified termination of the second cost of production verification was arbitrary, capricious, and otherwise not in accordance with law". Plaintiff's Memorandum, p. 8.

IV

The court need not and therefore does not express any opinion on those other points. Rather, the plaintiff has borne its burden of persuasion on the threshold issue discussed, with the necessary conclusion being that the ITA decision to investigate Nakajima's costs of production all over again in 1985 was not supported by substantial evidence on the record or otherwise in accordance with law within the meaning of 19 U.S.C. § 1515a(b)(1)(B). Plaintiff's motion for judgment upon that record must therefore be granted in the part indicated, and this matter must be remanded to the agency for further proceedings not inconsistent with this opinion regarding the margin of dumping, if any, of plaintiff's merchandise for the period May 1, 1981 to April 30, 1982.

The ITA may have 90 days from the date hereof for such proceedings and to report the results thereof to the court, whereupon the plaintiff may have 30 days thereafter in which to respond, and the defendant and the intervenor-defendant may have 15 days to reply thereto.

(Slip Op. 90-68)

METALLVERKEN NEDERLAND B.V., AND OUTOKUMPU METALLVERKEN, INC.,
PLAINTIFFS V. UNITED STATES, DEFENDANT, AND AMERICAN BRASS, ET AL.,
DEFENDANT-INTERVENORS

Court No. 89-09-00711

[Judgment for defendant; action dismissed.]

(Decided July 20, 1990)

Winthrop Stimson, Putnam & Roberts (Thomas V. Vakerics, Kenneth Berlin, Mark A. Monborne, James A. Meade, and Joni A. Laura); Arent, Fox, Kintner, Plotkin & Kahn (Stephen L. Gibson and Callie Georgeann Pappas), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (M. Martha Ries); Lyn M. Schlitt, General Counsel, Judith M. Czako, Acting Assistant General Counsel, United States International Trade Commission (Calvin H. Cobb, III), for defendant.

Collier, Shannon & Scott (David A. Hartquist, Jeffrey S. Beckington, and Kathleen Weaver Cannon) for defendant-intervenors.

⁹Plaintiff's Memorandum, p. 3.

DiCARLO, *Judge*: Metallverken Nederland, a Dutch brass manufacturer, and Outokumpu Metallverken, an importer of Japanese brass, seek review of the remand results ordered in *Metallverken Nederland B.V. v. United States*, 13 CIT —, 728 F. Supp. 730 (1989). On remand, the United States International Trade Commission determined that the domestic brass industry is materially injured or threatened with material injury by reason of dumped imports of rolled brass sheet and strip from the Netherlands and Japan. *Certain Brass Sheet and Strip From Japan and the Netherlands*, Inv. Nos. 731-TA-379 and 380 (Final) (Remand), USITC Pub. 2255 (Jan. 1990).

The Court finds that this determination is supported by substantial evidence and in accordance with law. As the Court has found the views of three commissioners to be supported by substantial evidence and in accordance with law, it is unnecessary to determine whether a fourth commissioner's affirmative findings on remand in substitution of a former commissioner's negative findings in the original determination were *ultra vires*.

BACKGROUND

In *Metallverken Nederland B.V. v. United States*, 13 CIT —, 728 F. Supp. 730 (1989), this Court remanded the portion of the Commission's affirmative material-injury determination addressing threat of material injury because there was substantial doubt whether a mistake of fact as to the date of suspension of liquidation in Commissioner Rohr's analysis of market penetration by Dutch and Japanese brass flawed the determination. The Court also requested a more specific statement in the threat analysis whether expanded Japanese capacity is likely to result in a significant increase in brass exports to the United States and whether there is a real and imminent threat of material injury.

On remand, Commissioner Rohr stated that the mistake in the date of suspension of liquidation had no effect on his analysis of market penetration. He also found that increased Japanese capacity is likely to result in a significant increase in exports to the United States and that the threat of material injury is real and imminent. Plaintiffs argue these findings are unsupported by substantial evidence and are otherwise not in accordance with law.

Although he had not participated in the original determination and questioned the propriety of his participation on remand, Commissioner Newquist believed the remand order and decisions of this court compelled him to provide his views in the remand determination. These views concurred with the affirmative material-injury findings of Commissioners Eckes and Lodwick previously affirmed by the Court. The addition of Commissioner Newquist's findings changed the original three-commissioner majority to a majority of four commissioners in the remand determination. Plaintiffs argue that the remand order only called for the participation of Commis-

sioner Rohr, and that Commissioner Newquist addressed questions beyond those specified in the remand order. Plaintiffs contend that the Commissioner's additional findings are, therefore, outside the scope of the remand and *ultra vires*. The Court requested additional briefs on this question.

DISCUSSION

I. Threat of Material Injury Determination on Remand:

A. Mistake of Fact as to the Date of Suspension of Liquidation:

In his evaluation of import volumes in the original determination, Commissioner Rohr attempted to explain a 1987 decline in market penetration by Dutch and Japanese imports. He noted that the figures "may have been affected by the suspension of liquidation," but erroneously stated that date to be September 1987 rather than February 1988. USITC Pub. 2099 at 32-33. The Court ordered a remand because it was "unable to ascertain to what extent the Commissioner relied on this factor in his analysis and whether his conclusion would have been different had he known the actual date of suspension of liquidation." *Metallwerken Nederland*, 13 CIT at —, 728 F. Supp. at 743.

Commissioner Rohr responded that the date of suspension of liquidation had no special relevance but was mentioned to illustrate his point regarding changes in the import-volume data attributable to the agency proceedings and the weight to be given those data. USITC Pub. 2255 at 5-6. He explained that the "underlying question was whether the data for 1987 and 1988 reflected normal, ordinary commercial activity or whether they may reflect aberrations caused by our investigations." *Id.* at 6-7.

The Commissioner's conclusion as to the probative value of the data remained unchange in light of the actual date of suspension of liquidation. He explained that the suspension

is not the only action in connection with a dumping action that may affect the behavior of the buyers and sellers in the market. Affirmative preliminary determinations of the Commission may also affect the market. The initiation of a dumping case in the first instance, and even the filing or rumored filing of a dumping case, can also affect the decision to buy and sell domestic or imported product.

Id. at 5, 6. The Commissioner remarked that the antidumping petition in this investigation was filed in July 1987, Commerce initiated the investigation in August 1987, the Commission made its preliminary determination in September 1987, and Commerce, which was to make its preliminary determination in December 1987, issued it in February 1988, at which time liquidation of entries was suspended. *Id.* Thus, he commented:

I had less confidence that 1987 yearly data and the interim 1988 data reflected normal operating conditions from which I would make projections about the future. I did not believe that the declines that the data show would have occurred absent the investigation nor did I believe that they would be reflective of trends were the investigation to be terminated after a negative finding.

This point * * * is equally compelling given that September 1987 was the date of the Commission preliminary determination, which is also likely to have an effect on the market, rather than being the date of the Commerce affirmative [determination].

Id. at 7.

Plaintiffs contend that the Commissioner's analysis reveals an "arbitrary and capricious rejection of market penetration data as inherently suspect and unreliable" merely because they happen to fall within the period of the antidumping investigation. Plaintiffs' Comments on Remand Determination at 16 (Plaintiffs' Comments).

Plaintiffs' argument is unpersuasive. The court has previously stated that "the initiation of antidumping and countervailing duty proceedings can create an artificially low demand for affected imports, thus distorting the data on which [the Commission] relies in making its determination." *USX Corp. v. United States*, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987); see also *Rhone Poulenc, SA v. United States*, 8 CIT 47, 53, 592 F. Supp. 1318, 1324 (1984). Commissioner Rohr evaluated 1987 and 1988 import-penetration data and, finding them to be unrepresentative of normal operating conditions, tempered his reliance on the data accordingly. See *Wieland Werke, AG v. United States*, 13 CIT —, 718 F. Supp. 50, 61 (1989) ("the Commission acted reasonably in gathering the data, identifying its inherent weaknesses, and tempering its reliance on the data"). Plaintiffs have failed to show that this finding is unsupported by substantial evidence on the record and not in accordance with law.

B. Productive Capacity and Capacity Utilization:

Under 19 U.S.C. § 1677(7)(F)(i)(II), the Commission is directed to consider "any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States." In assessing this factor in his original findings, Commissioner Rohr stated that "given the overall decline in Japanese home market sales, the increase [in Japanese capacity] must be devoted to exports either to the United States or other foreign countries." USITC Pub. 2099 at 33.

In its prior opinion, the Court held that the Commissioner could reasonably conclude from the evidence that increased Japanese capacity would be devoted to exports. *Metallwerken Nederland*, 13 CIT at —, 728 F. Supp. at 744. The plaintiffs claimed, however, that the Commissioner made no finding and the record contains no evi-

dence that increased exports would go to the United States. The Court agreed with the government's contention that it could infer from the Commissioner's findings that he concluded increased exports would be directed to the United States market. Nonetheless, as the Court was remanding on another issue, it requested "an explicit statement with some analysis whether increased capacity is likely to result in a significant increase in exports to the United States." *Id.*

In his findings on remand, the Commissioner remarked:

That capacity exists to expand exports to the United States at the discretion of the foreign producers is itself threatening. Of course, any showing that it is actually likely to increase shipments to the United States increases the threat potential.

In this case, I believe the facts demonstrate that foreign capacity not only exists but that there is a likelihood that it would result in increased imports.

USITC Pub. 2255 at 9.

Plaintiffs argue that the Commissioner's analysis suffers from several errors of fact and law. First, they allege that the Commissioner erroneously concluded

that he does not have to find that there is a likelihood that unused foreign capacity will result in increased imports before he is permitted to consider that "the foreign capacity situation weighed in affirmatively in a threat analysis."

Plaintiffs' Comments at 19 (quoting USITC Pub. 2255 at 9). Plaintiffs argue that this statement contravenes the rule that capacity alone is insufficient to establish a threat of material injury. See *Hannibal Indus., Inc. v. United States*, 13 CIT —, 710 F. Supp. 332, 337 (1989); *American Spring Wire Corp. v. United States*, 8 CIT 20, 28, 590 F. Supp. 1273, 1280 (1984), *aff'd sub nom. Armco, Inc. v. United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

The Commissioner never stated that, in the absence of support from other factors, foreign capacity alone is a sufficient basis for an affirmative threat determination. Moreover, *Hannibal* and *American Spring Wire*, refer to the situation where excess capacity was the only relevant economic factor indicating a threat. *Hannibal*, 13 CIT at —, 710 F. Supp. at 337; *American Spring Wire*, 8 CIT at 28, 590 F. Supp. at 1280. Here, the Commissioner based his conclusion on other factors indicating threat including increased market penetration, decreasing capacity utilization, the ability to shift production, and price suppression or depression of the domestic product. See USITC Pub. 2099 at 32-34; USITC Pub. 2255 at 4-10.

Plaintiffs allege that the second error is the Commissioner's mistaken view that "most" rather than "all" excess capacity was in Japan. Plaintiffs' Comments at 20. Since the record shows that Dutch capacity expanded in 1987, the Commissioner did not mischaracterize the evidence. Conf. R. 48 at A-44. Notwithstanding this evidence, the Commissioner's statement was not material to his deter-

mination. Increased capacity was a factor in the Commissioner's affirmative findings only as to Japanese brass. Section 1677(7)(F)(i) of Title 19 requires the Commission to consider several relevant economic factors, of which capacity is only one. There is no requirement that Commissioner Rohr's affirmative vote be supported by evidence showing unused capacity in the Netherlands as long as other economic factors support a finding of threat from Dutch brass.

As a third error, plaintiffs argue that the Commissioner failed to consider the availability of third-country markets for Japanese exports. Rather, they allege that he

appears to be suggesting, contrary to law, that any unused capacity existing in a foreign country must be completely and irrevocably dedicated to sales to third countries before unused capacity could be viewed as not "weighing in" to support an affirmative determination.

Plaintiffs' Comments at 20-21. The Court disagrees.

In examining threat of material injury, the Commission must "take into account the availability of other export markets * * *." *Rhone Poulenc*, 8 CIT at 50 n.11, 592 F. Supp. at 1322 n.11 (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 89, reprinted in 1979 U.S. Code Cong. & Admin. News 381, 475). The Commissioner weighed plaintiffs' contention that increased exports would not go to the United States against figures showing an increase in Japanese productive capacity. He did not, however, find their arguments "credible in light of the evidence." USITC Pub. 2255 at 10. The Commissioner discounted data showing increasing sales to third-country markets because this increase was not as rapid as the rise in capacity. He explained that the "Japanese argument is credible * * * only if it is clear that the additional capacity being placed on line in Japan is related to the increase in sales to [other] markets." *Id.* at 9.

The Commissioner observed that while "Japanese exports to countries other than the United States increased in each year for which the Commission obtained data from the Japanese producers," the data show "that over the period of investigation[,] the proportion of the increases in capacity devoted to third country exports grew smaller every year." *Id.* This finding is supported by record evidence, which also shows Japanese home-market shipments 32 million pounds lower in 1987 than in 1984. USITC Pub. 2099 at a-30. The Commissioner concluded that, while exports to other markets increased, this evidence did not preclude a finding that exports to the United States market would also increase. Thus, Commissioner Rohr considered the availability of third-country markets but reasonably found this evidence to be non-probative.

As a fourth error, plaintiffs allege that the Commissioner made a mistake of fact as to the type of capacity data provided by the Dutch. On remand, the Commissioner again mentioned that capacity figures were not very probative as to production limits because of

the ability to shift production from other types of brass. He noted that Dutch capacity data was provided for only C20000 series brass rather than all brass products produced in The Netherlands. USITC Pub. 2255 at 9, 9 n.15. Plaintiffs submit that the record shows Metallverken reporting on the basis of all flat-rolled brass. As stated *supra* at page 9, the Commissioner considered but did not rely on increased capacity in The Netherlands because of the concurrent growth in Dutch home-market sales. Accordingly, any mischaracterization of this evidence is immaterial.

As for the question of decreasing foreign capacity utilization, the statute directs the Commission to consider "the presence of underutilized capacity for producing the merchandise in the exporting country." 19 U.S.C. § 1677(7)(F)(i)(VI) (1988). The government correctly observes that there is no requirement that the Commission assess the likelihood that underutilized capacity will result in a significant increase in imports as it must when considering increased foreign capacity under 19 U.S.C. § 1677(7)(F)(i)(II).

Plaintiffs' remaining arguments against the Commissioner's finding regarding the destination of increased Japanese exports go to the weight given to the evidence, or allege that the Commissioner ignored certain data.

The Commission has broad discretion in assigning the weight given a particular economic factor, and it is presumed to have considered all record evidence. *Metallverken Nederland*, 13 CIT at —, 728 F. Supp. at 735, 736–37; *National Ass'n of Mirror Mfrs. v. United States*, 12 CIT —, 696 F. Supp. 642, 645, 648 (1988) (*Mirror Mfrs.*). Thus, the Commissioner need not respond to every piece of evidence raised by the parties, and failure to discuss certain information does not establish that he did not consider it. *Granges Metallverken AB v. United States*, 13 CIT —, 716 F. Supp. 17, 24 (1989); *Mirror Mfrs.*, 12 CIT at —, 696 F. Supp. at 648–49. As stated by our court of appeals, the fact that plaintiffs

can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence.

Matsushita Elec. Indus. Co. v. United States, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984).

Commissioner Rohr's finding that Japanese exports were likely to be sent to the United States sufficiently addresses the Court's questions in its prior opinion. Plaintiffs have failed to show that the Commissioner's findings on capacity and capacity utilization are unsupported by substantial evidence or are otherwise not in accordance with law.

C. Real and Imminent Threat of Material Injury:

In his original views, Commissioner Rohr concluded that Dutch and Japanese producers "could easily send" increased exports to the United States which "could easily push the domestic industry over the line into material injury." USITC Pub. 2099 at 34. Plaintiffs argued that this language and the Commissioner's views as a whole did not indicate that the threat of material injury was real and imminent as required under 19 U.S.C. § 1677(7)(F)(ii). The Court stated in its prior opinion:

Since the Court has already ordered a remand which may affect this question and in order to eliminate any possible doubt as to the Commissioner's meaning, the Court requests a more specific statement whether there is a real and imminent threat of material injury.

Metalwerken Nederland, 13 CIT at —, 728 F. Supp. at 747.

On remand, the Commissioner concluded that, based on his original views, "the threat posed by the Japanese and Dutch imports is real and imminent" due to the extreme vulnerability of the domestic industry. USITC Pub. 255 at 11. Plaintiffs argue that they based their challenge not on the Commissioner's failure to use the statutory language, but rather on the claim that the Commissioner's "determination followed a path, that at a minimum, was not reasonably discernable." Plaintiffs' Comments at 27. They maintain that the remand determination does not cure this deficiency and that it remains unsupported by substantial evidence because the Commissioner reveals no record evidence showing intent by or incentive on the part of Japanese and Dutch producers to increase exports to the United States.

An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." *American Spring Wire*, 8 CIT at 28, 590 F. Supp. at 1280. The "essence of the threat lies in the ability and incentive to act imminently." *Republic Steel Corp. v. United States*, 8 CIT 29, 41, 591 F. Supp. 640, 650 (1984).

In his original views, Commissioner Rohr described his task as ascertaining whether the effect of the imports is "likely to be injurious" and whether the threat was "within a reasonably imminent time frame." USITC Pub. 2099 at 32, 34. The Commissioner examined each of the statutory threat factors and premised his affirmative finding of threat upon increases in market penetration by Dutch and Japanese brass, an increase in Japanese productive capacity, price suppression or depression of the domestic product, underutilized Japanese capacity, and the capability of product-shifting by the Dutch producer. *Id.* at 33. The Court has held that each of these findings is supported by substantial evidence and is in accordance with law. In addition, the Commissioner explained on remand that:

I made the judgement [sic] in my original views that the threat I postulated would have ripened into actual material injury "but for" the suspension of liquidation. This conclusion means that actual injury would have occurred to the domestic industry by July 1988 had not this proceeding intervened. It is difficult to see any threat that could be more real and imminent than one which would have resulted in actual injury "but for" the suspension of liquidation.

USITC Pub. 2255 at 10.

Whether a threat of material injury is real and imminent is established through analysis of the threat factors listed under 19 U.S.C. § 1677(7)(F)(i). *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT —, 693 F. Supp. 1164, 1171 (1988). After examining these factors and conducting his "but for" analysis, the Commissioner could reasonably infer intent by the Japanese and Dutch producers to increase exports to the United States "within a reasonably imminent timeframe." Such intent is sufficient to meet the requirement under 19 U.S.C. § 1677(7)(F)(ii) that the threat of material injury be real and imminent. *American Spring Wire*, 8 CIT at 28, 590 F. Supp. at 1280.

The Court finds that the Commissioner complied with the remand order and that his findings are supported by substantial evidence and are in accordance with law.

II. Commissioner Newquist's Views:

On remand, Commissioner Newquist stated his opinion that remands for clarification of the views of majority commissioners still sitting on the Commission should be addressed solely by those commissioners. Therefore, he questioned the propriety of his participation in this remand. Nonetheless, the Commissioner believed that the language of the remand order and the court's decisions in *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT —, 704 F. Supp. 1068, 1070 n.2 (1988) and *Citrosuco Paulista, S.A. v. United States*, 12 CIT —, 704 F. Supp. 1075 (1988), required a remand to the entire Commission and compelled him to provide findings. USITC Pub. 2255 at 13-14.

Plaintiffs argue that the Court's remand order neither authorized nor instructed any commissioner other than Commissioner Rohr to participate in the remand. Plaintiffs' Comments on Remand Determination, at 4. Therefore, participation by other commissioners was outside the scope of the remand order and *ultra vires*. *Id.* at 5. Plaintiffs specifically target Commissioner Newquist's participation because his affirmative findings of material injury changed the original three commissioner majority to a majority of four commissioners in the remand determination.

The additional briefs ordered by the Court on the question of the scope of the remand revealed a split in the Commission on the issue of which commissioners may or should participate in a remand. All commissioners agree that a remand directed to the entire Commis-

sion is in keeping with consistent practice of the court and its statutory remand authority. U.S. International Trade Commission Memorandum Regarding Participation of Commissioners on Remand, at 4-5. Nevertheless, three commissioners argue that it would be improper for the court to specify which commissioners are required or permitted to participate in a remand proceeding. *Id.* at 6. They contend that the Commission practice is for all sitting commissioners to participate in remands and that this practice is consonant with the statutory scheme to promote prompt resolution of cases. *Id.* at 7.

The remaining three commissioners maintain that "[p]articipation by fewer than all commissioners is lawful and appropriate when the error found by the Court may be corrected by sitting Commissioners whose views were found to require clarification or correction." *Id.* at 8. They assert that the Commission's transmittal of a response to a remand order by less than all commissioners may, in appropriate circumstances, constitute action by the entire Commission. *Id.* at 9. While plaintiffs and defendant-intervenors argue the position of one or the other set of commissioners on this question, no brief discusses what constitutes "participation" in a remand.

The Court disagrees that the remand order was directed solely to Commissioner Rohr. The order followed the general rule that remands are to the Commission as a whole. See 19 U.S.C. § 1516a(c)(3) (1988); *USX Corp. v. United States*, 12 CIT —, 698 F. Supp. 234, 236 n.3 (1988); see generally, *SCM Corp. v. United States*, 2 CIT 1, 519 F. Supp. 911 (1981); *Sprague Elec. Co. v. United States*, 84 Cust. Ct. 243, 488 F. Supp. 910 (1980).

The Commission has broad discretion in fashioning its procedures. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Under the circumstances of this case, it is unnecessary to address plaintiffs' contentions that the substitution of Commissioner Newquist's affirmative material-injury findings for the former commissioner's negative material-injury findings exceeded the scope of the remand. This is because the final affirmative determination is based on two affirmative material-injury votes and Commissioner Rohr's affirmative threat of material-injury vote which are supported by substantial evidence and in accordance with law. See *USX Corp. v. United States*, 12 CIT —, 682 F. Supp. 60, 63 (1988); *BMT Commodity Corp. v. United States*, 11 CIT 524, 526, 667 F. Supp. 880, 882, *reh'g denied*, 11 CIT 854, 674 F. Supp. 868 (1987), *aff'd*, 852 F.2d 1285 (Fed. Cir. 1988), *cert denied*, 109 S. Ct. 1120 (1989).

CONCLUSION

The Court finds Commissioner Rohr's findings on remand to be supported by substantial evidence and in accordance with law. As the Court has found the views of three commissioners to be sup-

ported by substantial evidence and in accordance with law, it is unnecessary to determine whether a fourth commissioner's affirmative findings on remand in substitution of a former commissioner's negative findings in the original determination were *ultra vires*. This action is dismissed.

(Slip Op. 90-69)

NATIONAL HAND TOOL CORP., PLAINTIFF V.
UNITED STATES, ET AL., DEFENDANTS

Court No. 89-11-00636

ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

Plaintiff, National Hand Tool Corporation, moves for a protective order pursuant to Rule 26(c) of the Rules of this Court. Plaintiff contends that an order is needed to preserve the confidentiality of data and documents submitted to the defendant in response to discovery demands.

Held: The court concludes that, pursuant to Rule 26(c), the plaintiff has shown sufficient "good cause" so as to warrant a protective order on terms as modified herein.

[Plaintiff's motion for protective order granted.]

(Dated July 23, 1990)

Shadden, Arps, Slate, Meagher & Flom, (Rodney O. Thorson), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (Barbara M. Epstein), for defendant.

RE, Chief Judge: The question presented in this case pertains to the scope of a protective order requested by plaintiff, National Hand Tool Corporation, pursuant to Rule 26(c) of the Rules of this Court. Plaintiff requests the protective order in an effort to restrict the defendant's use of information obtained through the discovery process. The defendant objects to the terms of plaintiff's proposed protective order, and has submitted its own proposed order.

The first dispute between the parties pertains to paragraph 6 of the defendant's proposed protective order, which allows the defendant to disclose plaintiff's confidential information to "third party consultants and experts" in order to aid in the preparation of its defense. Plaintiff contends that such a disclosure "would cause substantial harm to [plaintiff] if it, or any of it, should fall into the hands of would-be competitors, customers or suppliers or if business decisions by any such firms were aided by persons having knowledge of that data." Furthermore, plaintiff contends that the defendant has no need to reveal that information to outside experts because the defendant has the necessary personnel within the Customs Service who have experience with these products, and are intimately familiar with the manufacturing process at issue in this

case. The parties, however, do not dispute that the information may be disclosed to government employees who assist counsel in conducting the case.

The second dispute between the parties stems from the methods utilized in the designation of confidential information. The third dispute pertains to paragraph 5(E) of the defendant's proposed protective order, which permits the defendant to disclose plaintiff's confidential information to persons who had prior access to the information. The fourth and final dispute arises from the method of dealing with the confidential information after the action is concluded.

BACKGROUND

This motion arises from Customs' denial, on October 20, 1989, of plaintiff's protest regarding the issuance of redelivery-marking notices by Customs, pursuant to Customs Regulation 134.3(b), for certain sizes or styles of steel forgings. The Customs Service issued the notices and barred entry of the steel forgings because they had not been marked with their country of origin. Plaintiff contends that, since the imported steel forgings undergo a "substantial transformation" through further manufacture in the United States, pursuant to Customs Regulation 134.35 they are exempt from country of origin marking requirements. After filing this action on November 27, 1989, plaintiff moved for a preliminary injunction, which sought to enjoin Customs from excluding from entry the steel forgings described in the redelivery-marking notices. This motion was denied. *See National Hand Tool Corp. v. United States*, 14 CIT —, Slip Op. 90-12 (Feb. 9, 1990).

On January 29, 1990, the defendant served plaintiff with approximately 57 pages of interrogatories, and a Request for Production of Documents. On February 15, 1990, plaintiff advised the defendant that some of the information requested was confidential, and proposed that plaintiff provide the information under a stipulated protective order. Between February 15 and March 16 the parties attempted to negotiate a mutually satisfactory protective order. Nevertheless, on March 20, 1990, plaintiff moved before this court for a protective order. The defendant objected to the terms of plaintiff's proposed order, and submitted its own version of an appropriate order.

DISCUSSION

Rule 26(c)(7) of the Rules of the Court of International Trade provides in pertinent part:

(c) Protective Orders. Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, em-

barrassment, oppression, or undue burden, delay or expense, including one or more of the following: * * *

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way * * *.

Since the language of Rule 26(c)(7) of the Rules of this Court is essentially identical to that of Rule 26(c)(7) of the Federal Rules of Civil Procedure, the court may look for guidance to those cases which have interpreted and applied the federal rule of civil procedure. See *A. Hirsh, Inc. v. United States*, 11 CIT 208, 214 n.15, 657 F. Supp. 1297, 1303 n.15 (1987) (quoting *Sumitomo Metal Indus., Ltd. v. Babcock & Wilcox Co.*, 69 CCPA 75, 78 n.3, 669 F.2d 703, 705 n.3 (1982)).

It has been noted that in the federal courts, "[t]he fact that sensitive information is involved in litigation gives a party neither an absolute nor automatic right to have the discovery process hindered." *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (N.D.N.Y. 1973). Rather, it is within the sound discretion of the trial court to issue a protective order that is appropriate under the particular circumstances. See *Aluminum Co. of America v. United States Dep't of Justice, Antitrust Div.*, 444 F. Supp. 1342, 1346 (D.D.C. 1978). Hence, under Rule 26(c)(7), the trial court has broad discretion to determine whether a protective order is warranted, and the specific restrictions that should be imposed. See *id.* at 1347. In the exercise of its discretion, and in determining the scope of a protective order, the trial court "must be guided by the liberal federal principles favoring disclosure, keeping in mind the need to safeguard confidential information transmitted within the discovery process from disclosures harmful to business interests." *Johnson Foils*, 61 F.R.D. at 409.

It is also well established that, in seeking a protective order, "the party seeking the order of confidentiality bears the burden of demonstrating the required 'good cause' supporting the issuance of such an order." *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977). As noted by the Court of Appeals for the Third Circuit, "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. (1986)). See also *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978) (A protective order under Rule 26(c) "contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements."). Furthermore, when a party asserts that the discovery process will cause competitive injury because it will result in the revelation of trade secrets, the party cannot rely solely upon conclusory statements, "but must present evidence of specific damage likely to result from disclosure." *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986).

In this case, the major dispute pertains to paragraph 5 of plaintiff's proposed protective order, which precludes confidential information from being shown to anyone other than counsel for the defendant, counsel's support staff, and government employees assisting counsel in the conduct of the action. Paragraph 6 of defendant's proposed order, however, states that:

Confidential Documents may be shown to third party consultants and experts, who sign a certification stating they are independent of all manufacturers of competitive merchandise, who are retained for the purpose of assisting in the preparation of this action on the condition that, before making disclosure, the defendants must obtain an agreement in writing to be bound by the provisions of this Order (in the form of Exhibit A hereto) from such consultant, expert or other third party.

Confidential Documents may be shown to third party consultants and experts who are affiliated with manufacturers of competitive merchandise, *only* with prior written consent of plaintiff, or upon order of the court.

(emphasis in original).

Plaintiff maintains that the material requested by the defendant "relates to description and sequence of procedures, sources of materials, costs of materials, labor and equipment and is highly sensitive from a competitive standpoint." Plaintiff asserts that "[i]t would cause substantial harm to [plaintiff] if it, or any of it, should fall into the hands of would-be competitors, customers or suppliers or if business decisions by any such firms were aided by persons having knowledge of such data."

It is clear that plaintiff has only made "broad allegations of harm," rather than a particularized showing of injury. See *Cipollone*, 785 F.2d at 1121. See also *Johnson Foils*, 61 F.R.D. at 410 (The court denied defendant's motion for a protective order limiting the number of technical experts who may view its confidential information because "defendant gives no particular reason to limit this information to a specified number of persons and * * * such an order would unnecessarily hamper the progress of this litigation, and be unfair to legitimate use of the information by the plaintiff.").

It would also seem clear that plaintiff's argument for the restriction on the defendant's use of the information is based on mere conjecture. Nonetheless, in support of its argument, plaintiff submits that "there is no need for the government to disclose this confidential data to any outsiders[,] [since] [t]he information sought is capable of being understood by government counsel who drafted the discovery requests." Plaintiff's conclusory statements may not form the basis for a restriction on the methods the defendant may use in the preparation of its case.

It is also important to note that the defendant has taken precautions in its proposed protective order to protect plaintiff from possible competitive injury. Paragraph 6 of the defendant's proposed order provides that the defendant is free to disclose the plaintiff's confidential information only to experts who are independent of all manufacturers of competitive merchandise. Paragraph 6 also provides that plaintiff must consent in writing, or a court order must be obtained, before the information may be shown to experts affiliated with manufacturers of competitive merchandise. Hence, the court adopts the language of paragraph 6 of the defendant's proposed order, which, with precautions, permits the disclosure of plaintiff's confidential information to third party consultants and experts.

The parties also disagree as to the proper wording to be used in paragraph 5(C), which pertains to the disclosure of confidential information to defendant's employees. The plaintiff's proposed order states that, with plaintiff's written consent, disclosure may be made to "[e]mployees of the defendants * * * who are required to assist counsel in the conduct of this action." In contrast, the defendant's proposed order refers to defendant's employees "who are engaged in assisting counsel * * *." The court adopts the language set forth in the defendant's proposed order.

The second matter in dispute relates to the process by which information is to be designated confidential. Paragraph 2(a) and (c) of the defendant's proposed order modifies plaintiff's order, which had left the designation to the discretion of plaintiff's counsel. The defendant's order provides that plaintiff designate information as "confidential" "by affidavit evidence of a person with personal knowledge of the facts * * *." This, however, would hamper the discovery process unnecessarily. Each party's proposed protective order provides for a procedure by which the defendant may object to plaintiff's designation of information as confidential. As long as plaintiff, in good faith, designates information to be confidential, it is unnecessary and unreasonable to add the burden of obtaining an affidavit from a person with personal knowledge of the facts.

In *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 584-85 (D.N.J. 1985), writ granted, 785 F.2d 1108 (3d Cir. 1986), the court was faced with a disagreement over the method of designating material confidential. A main concern of the court dealt with the existence of a mechanism to challenge a party's belief that certain material was confidential. See *id.* at 584-85. The parties in this case do not dispute that the protective order should contain a provision providing a mechanism for defendant to object to plaintiff's designation of material as confidential. Hence, paragraph 8 of the protective order will allow defendant to object, and grants plaintiff 14 days "in which to withdraw the claim to confidentiality or otherwise resolve the disagreement, or move the Court to resolve the disagreement."

The parties are also in conflict as to the proper labelling of pages containing some confidential and some non-confidential information. The plaintiff maintains that the page should be labelled "Confidential." The defendant, however, in its proposed order, asserts that, to make it clear that the entire page is not confidential, the page should be labelled "This page contains confidential information." Since the provision in defendant's proposed order is more precise, it is adopted by the court.

The third major dispute pertains to paragraph 5(E) of the defendant's proposed protective order. Paragraph 5(E) states:

Except with the prior written consent of the plaintiff, or as set forth in paragraph 4, no document designated as Confidential and no information contained therein may be disclosed to any person other than:

* * * * *

E. Persons who saw or had access to such Confidential Documents prior to entry of this Order.

Plaintiff concedes that those persons who know, or have obtained the data independently of the government's discovery, are free to use it. It is clear, however, that the fact that a person had prior access to plaintiff's confidential information does not provide a justification for present access to the information. Accordingly, this provision will not be included in the protective order.

The final dispute between the parties relates to the disposal of the plaintiff's confidential documents at the termination of the action. The court adopts the defendant's alternative, which provides that "[u]pon conclusion of this litigation, including such appellate review as may occur * * *," the documents will be destroyed, or returned to plaintiff.

CONCLUSION

Plaintiff's failure to articulate specific damages or harm that will be allegedly suffered as a result of the disclosure of confidential information to third party independent experts leads the court to deny plaintiff's request for such a restriction.

Plaintiff's motion for a protective order, as set forth in the appendix, is granted.

APPENDIX

PROTECTIVE ORDER

This matter coming before the Court upon application of plaintiff for an order under Rule 28(c) restricting the disclosure of trade secrets, or other confidential research, development, or commercial information, which will be supplied to defendant in this proceeding and placing such information and documents under seal of this Court; it appearing to the Court that the nature of the information sought, as represented by the plaintiff's counsel, establishes good cause; and that defendant consenting to the application of plaintiff; it is therefore ORDERED:

1. For purposes of this Order, "documents" shall mean all written, recorded or graphic matter of any nature whatsoever, including, but not limited to: interrogatory answers and documents produced by the plaintiff in this action, whether pursuant to formal discovery or by informal agreement; transcripts of and exhibits to depositions taken in this action; and any portions of any documents filed in this action which quote from or summarize any of the foregoing documents.

2a. For purposes of this Order, "Confidential Document(s)" shall mean all documents which are designated as "confidential" by the representation of plaintiff's counsel at the time of furnishing copies in connection with this action. Such designation is to be made by stamping or otherwise inscribing the word "Confidential" upon the document itself. When a document contains information which is non-confidential, the plaintiff will make a reasonable effort to segregate the confidential portions by clearly identifying the specific pages and/or portions thereof which are confidential. Those portions which are not confidential shall not be restricted by this Order. No document or information may be designated as "Confidential" which was made available to the general public.

b. Those pages furnished to defendant which are not stamped shall not be treated as confidential unless the cover page contains the additional statement that the entire document is confidential. A cover page which is stamped "Confidential" will not be treated as confidential unless it contains the additional statement that "This page is confidential." If a page of a document contains both confidential and non-confidential information, the page will be stamped, "This page contains confidential information," and an additional copy of that page, not so stamped, will be provided to defendant with the confidential information deleted.

c. With respect to deposition testimony, counsel for the producing party may, on the record of the deposition or by written notice to counsel for all parties no later than 72 hours after receipt of a deposition transcript, designate all or any portion thereof as "Confidential" in accordance with the terms of this Protective Order. All copies of deposition transcript that contain confidential matter shall be prominently marked "Confidential" on the cover thereof and, if and when filed with the Clerk of the Court, shall be filed under seal, as provided by rule 81(h), Rules of the Court of International Trade.

3. Persons receiving Confidential Documents pursuant to this Protective Order shall not make use of or disclose any of it for any purpose other than the defense of this action. Nothing in this Protective Order precludes the government from using material produced by plaintiff in this action and designated as "Confidential," if such material was obtained independently of this action.

4. Confidential Documents may be referred to in interrogatory answers, motions, and briefs, and may be marked as deposition or trial exhibits in this action; provided, however, that no Confidential Documents shall be used for any of these purposes unless it, or the portion of the Court paper which discloses the contents of any such documents, is appropriately marked and separately filed under seal with the Clerk of the Court, in accordance with the provisions of Rule 81(h), Rules of the United States Court of International Trade.

5. Except with the prior written consent of the plaintiff, or as set forth in paragraph 4, no document designated as Confidential and no information contained therein may be disclosed to any person other than:

A. Counsel for the defendant in this action who are engaged in the conduct or preparation of this action or any appeal from a decision in this action.

B. Secretaries, paralegal assistants, and clerical personnel who are engaged in assisting counsel (as described in item A of this paragraph) in the preparation of this action.

C. Employees of the defendant (other than those described in subparagraphs A and B) who are engaged in assisting counsel for the defendant in the conduct of this action.

D. Authorized personnel of the Court of International Trade.

E. Those persons specified in paragraph 6 who meet the conditions of that paragraph and paragraph 7.

6. Confidential Documents may be shown to third party consultants and experts, who sign a certification stating they are independent of all manufacturers of competitive merchandise, who are retained for the purpose of assisting in the preparation of this action on the condition that, before making disclosure, the defendant must obtain an agreement in writing to be bound by the provisions of this Order (in the form of Exhibit A hereto) from such consultant, expert or other third party. Confidential Documents may be shown to third party consultants and experts who are affiliated with manufacturers of competitive merchandise, *only* with prior written consent of plaintiff, or upon order of the Court.

7. Except for persons described in Paragraph 5, subsections (A), (B) and (D) (i.e., counsel for the defendant in this action, secretaries, paralegal assistants, and clerical personnel who are engaged in assisting such counsel in the preparation of this action, and authorized Court Personnel) no person authorized under the provisions of this Order to receive access to Confidential Documents shall be granted access to them until that person has read this Order and agrees in writing to be bound by its provisions (in the form attached as Exhibit A) and counsel for the defendant shall be responsible for maintaining a list of all such persons to whom such documents are disclosed as well as copies of agreements signed by them. For good cause shown, such list and agreements shall be made available for inspection by counsel for the plaintiff on order of the Court.

8. In the event defendant for good cause disagrees with plaintiff's designation of confidentiality with respect to particular information or documentation, defendant shall so advise plaintiff, and plaintiff shall thereupon have fourteen (14) days in which to withdraw the claim to confidentiality or otherwise resolve the disagreement, or move the Court to resolve the disagreement. During the pendency of any such motion, defendant shall not disclose the information or documentation that is the subject of said motion.

9. Upon conclusion of this litigation, including such appellate review as may occur, documents designated Confidential and all copies of same (other than exhibits of record), shall be destroyed by the defendant; or alternatively, if requested by plaintiff, such documents and copies (other than exhibits of record) shall be returned to the plaintiff at its request, other than copies containing work notes of counsel or other authorized persons, which shall be destroyed.

10. Upon motion of any party herein and for good cause shown, the court may modify the terms of this Order.

EXHIBIT A

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

The undersigned, _____ (print or type name), in connection with *National Hand Tool Corporation v. United States, et al.*, Court No. 89-11-00636, hereby acknowledges that he or she has received a copy of the Protective Order entered in that action, which is attached hereto as Exhibit 1, has read same and agrees to be bound by all of the provisions thereof and to submit to the jurisdiction of the United States Court of International Trade.

Dated: _____

Signature _____

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C80/206 7/16/90 Rustani, J.	Abitibi-Price Sales Corp.	86-10-01382	262.75 Various rates	262.67 Free of duty	Abitibi-Price Sales Corp. v. U.S., S.O. 89-136	Detroit Champaign Sault Ste. Marie Printing Paper
C80/207 7/16/90 Re, C.J.	Diffredo, Ltd.	88-9-01388	712.05 Various rates	664.10 or 712.49 Various rates	Agreed statement of facts	Detroit Conveyor, etc.
C80/208 7/18/90 Muggrave, J.	Tulsa, Inc.	88-11-00861	649.43 9.2%	658.00 6.4%	Agreed statement of facts	Los Angeles Tungsten carbide blanks
C80/209 7/20/90 Muggrave, J.	Amerenda Hess Corp.	87-7-00786	475.25 Various rates	475.25 Free of duty	Agreed statement of facts	Port Everglades Moor fuel
C80/210 7/20/90 Aquilino, J.	Bellarno Int'l	85-7-00963	716.09-716.45, 720.10-720.18 or 715.05 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 678.20 rates	Bellarno Sales, Corp. v. U.S., 678 F.2d 1413 (1980) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog & digital watches, etc.
C80/211 7/20/90 Aquilino, J.	Blue Spot Int'l	85-5-00709	716.09-716.45, 720.10-720.18 or 715.05 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 678.20 rates	Bellarno Sales, Corp. v. U.S., 678 F.2d 1413 (1980) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog & digital watches, etc.
C80/212 7/20/90 Aquilino, J.	Blue Spot Int'l	85-9-01183	716.09-716.45, 720.10-720.18 or 715.05 Various rates	688.40, 688.45, 688.43, 688.42, 688.36, or 678.20 rates	Bellarno Sales, Corp. v. U.S., 678 F.2d 1413 (1980) or Texas Instruments, Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog & digital watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C30/213 7/20/90 Aquilino, J.	Granada Electronics, Inc.	83-9-01266	716.09-716.45, 720.10-720.18 or 715.05 Various rates	698.40, 698.45, 698.43, 698.42, 698.36, or 676.30 rates	Belfont Sales, Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments, Inc. v. U.S., 673 F.2d 1376 (1982)	New York Quartz analog & digital watches, etc.
C30/214 7/20/90 Musgrave, J.	I.D. Enterprises, Inc.	88-9-00727	716.18, 720.28, 720.34 Various rates	698.43, 4.5% or 4.7%	Belfont Sales, Corp. v. U.S., 878 F.2d 1413 (1989)	Los Angeles Quartz analog watch movements
C30/215 7/20/90 Aquilino, J.	North American Foreign Trading Corp.	88-7-00891	715.05, 716.27, 720.28, 740.24 or 716.09-716.45 Various rates	698.43 4.7%	Agreed statement of facts	New York Quartz analog watches & movements
C30/216 7/20/90 Aquilino, J.	North American Foreign Trading Corp.	87-2-00408	715.05, 716.09-716.45, 720.24, 740.25 Various rates	698.42 4.3%	Agreed statement of facts	New York Quartz analog watches & movements
C30/217 7/20/90 Theocales, J.	Sarnie Handbag Co.	86-1-07067	706.41, 20%	706.34 11.6%	Agreed statement of facts	New York Ladies' handbags
C30/218 7/20/90 Theocales, J.	Sarnie Handbag Co.	86-12-01550	706.41, 20%	706.34 11.6%	Agreed statement of facts	New York Ladies' handbags
C30/219 7/20/90 Musgrave, J.	Taltex, Inc.	88-7-00415	365.25 Various rates	359.60 Various rates	Agreed statement of facts	New York Houston Roofing material
C30/220 7/20/90 Aquilino, J.	Zale Corp.	84-3-00391	716.09-716.45, 715.05, 740.25, 720.24 Various rates	698.34, 698.35, 698.40, 698.42, 698.43, 698.44, or 698.45 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989)	New York Quartz analog watch movements
C30/221 7/20/90 Musgrave, J.	General Electric Co.	88-1-00041	709.17 4.7%	709.63 2.2%	Agreed statement of facts	Milwaukee Computerized Tomography Systems

ABSTRACTED VALUATION DECISIONS

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V90/30 7/18/90 Re, C.J.	Hewlett-Packard Co.	86-7-00963	—	Appraised value is 42.5% of respective net exchange prices in effect on date of entry	Agreed statement of facts	San Francisco Defective parts and components of electronic equipment
V90/31 7/18/90 Re, C.J.	Hewlett-Packard Co.	87-2-00304	—	Appraised value is 42.5% of respective net exchange prices in effect on date of entry	Agreed statement of facts	San Francisco Defective parts and components of electronic equipment
V90/32 7/18/90 Re, C.J.	Hewlett-Packard Co.	87-8-00638	—	Appraised value is 42.5% of respective net exchange prices in effect on date of entry	Agreed statement of facts	San Francisco Defective parts and components of electronic equipment
V90/33 7/18/90 Re, C.J.	Hewlett-Packard Co.	88-1-00129	—	Appraised value is 42.5% of respective net exchange prices in effect on date of entry	Agreed statement of facts	Boston, San Francisco Defective parts and components of electronic equipment

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